(26,303)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 836.

ABRAHAM L. SUGARMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 Pleas Before the Honorable the Judges of the United States District Court for the District of Minnesota.

United States District Court for the District of Minnesota, Second Division.

No. 63.

THE UNITED STATES, Plaintiff,

vs.

ABRAHAM L. SUGARMAN, Defendant.

Be it remembered, that at the October term, A. D. 1917, of the United States District Court for the District of Minnesota, Second Division, and on, to-wit: the 24th day of October, A. D. 1917, the Grand Jury of the United States for said district and division returned into said Court a certain bill of Indictment against one Abraham L. Sugarman, the defendant in the above entitled cause, which said bill of Indictment is in the words and figures following, to-wit:

The District Court of the United States of America for the District of Minnesota, Second Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of Mankato within and for the District and Division aforesaid, on the fourth Tuesday in October, being the twenty-third day of October, in the year of our Lord one thousand nine hundred and seventeen, by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

UNITED STATES OF AMERICA,
District of Minnesota,
Second Division, sct:

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, That heretofore, towit, on the 24th day of July, A. D. 1917, the United States then and there on said date being at war, one Abraham L. Sugarman, late of said division and district, then and there
2 being, at the Township of Kelso, in the County of Sibley, in the state and District of Minnesota, and within the jurisdic-

tion of this court, did feloniously and wilfully attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States, to the injury of the service and of the United States, by then and there urging, counseling, and advising a number of young men, towit: Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Vonder Brelje, Edward Weskworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Robt. Mesker, and Raymond Mesker, and many others, whose names are to the Grand Jury unknown, not to report when ordered so to do by the military authorities of the United States for military service, they the said Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Von der Brelje, Edward Weckworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Robt. Mesker and Raymond Mesker, and other persons whose names are unknown, being persons who had theretofore registered for service in the military forces of the United States, in accordance with that certain Act of Congress of May 18, 1917, entitled, "An Act authorizing the President to increase temporarily the Military Establishment of the United States" and the rules and regulations of the President promulgated pursuant to said Act of Congress of May 18, 1917; he the said Abraham L. Sugarman then and there well knowing that the United States was at war on the said 24th day of July, 1917, which is against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

ALFRED JAQUES,
United States Attorney.

(Endorsed:) Indictment—A True Bill. J. C. Jackson, Foreman of the Grand Jury. Names of Witnesses examined before the Grand Jury: R. L. Sander, G. W. Wolter, Lewis Kill, John F. McGovern, E. W. Zacharias, Joseph P. McGovern. Alfred Jaques, United States Attorney. Filed Oct. 24, 1917. Charles L. Spencer, Clerk, by Carl E. Bredeson, Deputy Clerk.

3 And thereafter, and on the same day, certain proceedings were had in said court in said cause which were duly recorded in the words and figures following, to-wit:—

United States District Court, District of Minnesota, Second Division.

Term Minutes, October Term, A. D. 1917, October 24, 1917.

Court opened pursuant to adjournment.
Present: Honorable Wilbur F. Booth, Judge.

No. 63.

THE UNITED STATES

vs.

ABRAHAM L. SUGARMAN.

Indictment under Sec. 3 of Act of June 15, 1917.

And now the defendant in the above entitled action, Abraham L. Sugarman, appears at the bar of this Court, personally, and by Seymour Stedman, Esq., and Louis L. Schwartz, Esq., his attorneys, and he is arraigned upon an Indictment presented and filed against him at the present term of this Court, charging that on the 24th day of July, A. D., 1917, at the Township of Kelso, in the County of Sibley, in the State and District of Minnesota, he did then and there feloniously and wilfully attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States; and the reading of said Indictment having been expressly waived by said attorneys for said defendant, for plea to said Indictment the said defendant for himself doth say that he is not guilty.

And thereafter, and on the same day, certain other proceedings were had in said court in said cause which were duly recorded in the words and figures following, to-wit:—

United States District Court, District of Minnesota, Second Division.

Term Minutes, October Term, A. D. 1917, October 24, 1917.

Court opened pursuant to adjournment.
Present: Honorable Wilbur F. Booth, Judge.

THE UNITED STATES

vs.

ABRAHAM L. SUGARMAN.

Indictment under Sec. 3 of Act of June 15, 1917.

And now the defendant in the above entitled action, Abraham L. Sugarman, being present in Court, to him come Seymour

4 Stedman, Esq., and Louis L. Schwartz, Esq., his attorneys. the plaintiff appearing by Alfred Jaques, Esq., and William Anderson, Esq., its attorneys, upon whose motion therefor this cause is ordered for trial.

Whereupon, said defendant, by leave of the Court withdraws his plea of not guilty heretofore entered by him to the indictment herein, and by his said attorneys makes oral demurrer to said indictment; and the same having been argued and submitted to the Court, it is by the Court

Ordered: that said demurrer be and the same hereby is overruled.

An exception to such ruling is allowed to defendant.

And thereupon said attorneys for said defendant move the Court that said indictment be quashed.

And said motion having been argued and submitted to the Court, it is by the Court

Ordered: that defendant's motion to quash the indictment herein be and the same hereby is overruled and denied.

An exception to such ruling is allowed to defendant.

And thereupon said defendant, for plea to the indictment herein against him, doth say that he is not guilty. And thereupon a jury having been called comes as follows, to-wit:—Fred A. Schauer, August Lindell, J. Donovan, Dan Firquay, Charles Ripley, William Kraemer, W. R. Barnes, Henry Mans, Oscar Johnson, W. R. Jeffers, Garrett Doyle and W. J. Emerson, being twelve free and lawful men who are duly empanelled as a jury and sworn to try the issues joined herein.

Mr. Jaques opens and states the case to the Court and jury on the part of the plaintiff.

R. L. Sander is sworn, is examined and testifies as a witness on the part of the plaintiff.

Gerard William Walter is sworn, is examined and testifies as a witness on the part of the plaintiff.

Louis Hill is sworn, is examined and testifies as a witness on the part of the plaintiff.

And the further trial of said cause is continued until 9:30 o'clock A. M., of the following day.

5 And thereafter, and on the 25th day of October, A. D. 1917, certain other proceedings were had in said court in said cause, which were duly recorded in the words and figures following to-wit:

United States District Court, District of Minnesota, Second Division.

Term Minutes, October Term, A. D. 1917, October 25, 1917.

Court opened pursuant to adjournment.
Present: Honorable Wilbur F. Booth, Judge.

THE UNITED STATES

vs.

ABRAHAM L. SUGARMAN.

Indictment under Sec. 3 of Act of June 15, 1917.

The defendant in the above entitled action being present in Court this day, and the parties to said action also appearing by their same attorneys, respectively, as on the preceding day, the jury having been called and all being present, the further trial of said action proceeds as follows:

Evald W. Zacharias is sworn, is examined and testifies as a witness on the part of the plaintiff.

John F. McGovern is sworn, is examined and testifies as a witness on the part of the plaintiff.

Joseph P. McGovern is sworn, is examined and testifies as a witness on the part of the plaintiff.

And here the plaintiff rests its case.

A motion on behalf of the defendant that the jury be directed to find a verdict of not guilty is denied, with an exception to defendant.

Mr. Stedman opens and states the case to the Court and jury on the part of the defendant.

Abraham L. Sugarman is sworn, is examined and testifies as a witness on his own behalf as the defendant.

Evald W. Zacharias, recalled, is examined and testifies as a witness on the part of the defendant.

Earney H. Lieske is sworn, is examined and testifies as a witness on the part of the defendant.

Fred A. Lieske is sworn, is examined and testifies as a witness on the part of the defendant.

6 And here the defendant rests his case; and the testimony is closed.

Mr. Jaques opens his summing up of the case to the Court and jury on behalf of the plaintiff.

Mr. Schwartz sums up the case to the Court and jury on behalf of the defendant, in part.

And the further trial of this cause is continued until 9:30 o'clock of the following day.

And thereafter, and on the 26th day of October, A. D. 1917, the following proceedings were had in said court in said cause, which were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Second Division.

Term Minutes, October Term, A. D. 1917, October 26, 1917.

Court opened pursuant to adjournment.
Present: Honorable Wilbur F. Booth, Judge.

THE UNITED STATES
vs.
ABRAHAM L. SUGARMAN.

Indictment under Sec. 3 of Act of June 15, 1917.

The defendant in the above entitled action being present in Court this day and the parties to said action also appearing by their same attorneys, respectively, as on the preceding day, the jury having been called, and all being present, the further trial of said action proceeds as follows:

Mr. Stedman concludes the summing up of the case to the Court and jury on the part of the defendant.

Mr. Jacques closes his summing up of the case to the Court and jury on the part of the plaintiff.

The jury is charged by the Court and retire under the charge of an officer duly qualified and sworn to keep them to consider of their verdict.

And thereafter the said jury is returned into Court, and being called all are present, and in the presence of said defendant the said jury to render their verdict, wherein, by their foreman, they
7 do say as follows: "We, the jury in the above entitled action, do find the defendant, Abraham L. Sugarman, guilty as charged in the indictment."

Whereupon defendant, by his said attorneys, moves the Court that judgment upon the verdict aforesaid be arrested and that said defendant be granted a new trial. And it is by the Court

Ordered: That said motion, in respect to arrest of judgment herein, be and the same hereby is overruled and denied.

And thereafter, and on the same day, a verdict was filed in said court in said cause in the words and figures following, to-wit:

United States District Court, District of Minnesota, Second Division.

THE UNITED STATES OF AMERICA, Plaintiff,
against
ABRAHAM L. SUGARMAN, Defendant.

Verdict.

We, the Jury in the above entitled action, do find, the defendant, Abraham L. Sugarman, guilty as charged in the Indictment.

W. R. BARNES, *Foreman.*

(Endorsed:) Verdict. Filed Oct. 26th, 1917. Charles L. Spencer, Clerk, by Carl E. Bredeson, Deputy.

And thereafter, and on the same day, certain other proceedings were had in said court in said cause, which were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Second Division.

Term Minutes, October Term, A. D. 1917, October 26, 1917.

Court opened pursuant to adjournment.
Present: Honorable Wilbur F. Booth, Judge.

THE UNITED STATES OF AMERICA, Plaintiff,

against

ABRAHAM L. SUGARMAN, Defendant.

Judgment and Sentence.

8 Now, on this 26th day of October, A. D. 1917, the United States Attorney for the District of Minnesota, and the defendant in the above entitled action, Abraham L. Sugarman, in his own proper person, come into open Court, and the said United States Attorney moves the Court that judgment be now rendered against and sentence pronounced upon said defendant in accordance with the verdict, heretofore duly rendered by a jury and entered in said action, that said defendant is guilty as charged in the indictment in said action against said defendant for the crime of having feloniously and wilfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States, committed at Kelso, in the County of Sibley, in the State and District of Minnesota, on the 24th day of July, A. D. 1917; and said defendant is asked by the Court whether he has anything to say why judgment should not now be rendered and sentence pronounced as aforesaid, but neither he nor any one for him says anything in arrest thereof; whereupon, in accordance with said verdict, it is by the Court

Considered and adjudged that said defendant is guilty of the crime aforesaid and that as punishment therefor said defendant be confined in the United States Penitentiary, situated at Leavenworth, Kansas, for the term of three (3) years and until he shall have been discharged from said penitentiary by due course of law.

And thereafter, and on the 17th day of December, A. D. 1917, a certain bill of exceptions was filed in said court in said cause in the words and figures following, to-wit:

9 United States District Court, District of Minnesota, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ABRAHAM L. SUGARMAN, Defendant.

Bill of Exceptions.

The above entitled action came duly on for trial at the October A. D. 1917 term of said court, held at the City of Mankato, in said district, the trial beginning on the 24th day of October, the Honorable Wilbur F. Booth, one of the judges of said court, presiding.

Alfred Jacques, Esq., United States District Attorney, and William Anderson, Esq., Assistant United States District Attorney, appeared for the plaintiff; and

Seymour Stedman, Esq., and Louis L. Schwartz, Esquire, appeared on behalf of the defendant.

A jury was duly empaneled to try the action, and thereupon the following proceedings were had therein, to wit:

The defendant withdraws his plea of not guilty heretofore entered to the indictment herein and to said indictment interposes an oral demurrer.

And proceedings thereon and upon a subsequent motion to quash said indictment are as follows:

10 Mr. Stedman: We demur to the indictment, on the ground that the indictment does not state an offense.

The Court: Overruled.

Mr. Stedman: Exception.

Mr. Stedman: I move to quash the indictment. The point I am making on this indictment is this: that an indictment to be good must not set forth conclusions; it must state facts, from an observation of which and reading of which there will appear to have been an offense committed. That is the point I am making on my motion to quash.

The Court: The motion to quash should be denied.

Mr. Stedman: Exception.

The demurrer to the indictment herein having been overruled, and the motion to quash said indictment having been denied, defendant again pleads not guilty to said indictment and the trial of said cause proceeds as follows:

RUTHERFORD L. SANDER, called to testify as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. Jacques:

Q. Where do you live, Mr. Sander?
A. Arlington.
Q. Arlington, Minnesota?
A. Arlington, Minnesota.
Q. That is in Sibley County?
A. Sibley County.
Q. How long have you lived there?
A. Born there.
Q. At Arlington?
A. Yes, sir.
11 Q. Were you living there on the 24th of July last?
A. Yes, sir.
Q. In business there at Arlington?
A. General merchandise.
Q. General merchandise?
A. Yes, sir.
Q. Did you know anything about a meeting out at the Township of Kelso, Sibley County, the night of the 24th?
A. Yes, sir.
Q. Tell the jury how you learned about that meeting.
A. Why, I heard about it during the day, from a report, people that——
Q. Talk on the street?
A. Yes, stores in town.
Q. Did you see any bills announcing the meeting?
A. No, did not.
Q. Did you go to that meeting?
A. Yes.
Q. About what time?
A. At around close to nine o'clock.
Q. How did you go out?
A. In an automobile.
Q. How far is this Kelso Township from Arlington?
A. The township, about five miles.
Q. Where was the meeting held?
A. At the town hall.
Q. Of Kelso Township?
A. Yes, sir.
Q. Was that about five miles from Arlington?
A. About seven; I imagine 6½ or 7 miles.
Q. When you arrived—Did anybody go out with you?
A. My brother, Ed Sander.
Q. Anybody else?
A. No, just two of us.

Q. When you arrived there how many people were assembled, in your opinion and judgment?
A. Why, my opinion, about 250 or 500—more or less.
Q. Was the meeting open when you were there, called to order? What was the condition?
A. I didn't know whether the speech was over or not; I inquired; said the speaker had not arrived.
12 Q. What time was it you said you got there?
A. I imagine around nine o'clock?
Q. Did you at any time that night at the meeting see Mr. Sugarman, the defendant here?
A. Yes, sir.
Q. What time of the night was it that he arrived at the meeting?
A. Why, I imagine 10:30 or 11:00, somewhere around there.
Q. Did you notice any young men there that you knew?
A. Yes.
Q. Who had registered for the draft?
A. Yes.
Q. Can you name them?
A. Why, I could name some of them, that I talked with.
Q. Name those you can.
A. Why, I talked with two Sander boys.
Q. Who were they?
A. George and Alfred Sander.
Q. Relatives of yours?
A. Yes.
Q. What relation?
A. They are my brother's sons.
Q. Who else?
A. The Mesker boys.
Q. Do you know their first names?
A. Raymond and Rob.
Q. They were of registration age?
A. Yes, sir.
Q. And had registered. Were there any others?
A. There was more.
Q. I mean those that you can recall their names?
A. Martin Blasing.
Q. Those were the only ones whose names you have in mind?
A. Why, yes.
Q. That you talked with at the meeting?
A. Yes.
Q. Did Mr. Sugarman commence to speak as soon as he got there?
A. Yes, I think he did; don't know for sure; he might have been in the crowd.
13 Q. Did he speak at all about this selective draft act?

Mr. Stedman: Objected to as leading, suggestive to the witness.
The Court: I think it is leading.

Q. Well, can you give us an idea of what he talked about?

Mr. Stedman: Object to the form of the question.

Q. What did he say, as far as you can—Go on and state to the jury the things that impressed you from the speech that he made.

Mr. Stedman: Object to that, suggesting to the witness the testimony only in part of what was said. That would be manifestly unfair.

The Court: He may state, as far as he can, everything that was said by the defendant.

Q. Go on.

The Witness: Mr. Sugarman—why, there was another fellow spoke, that told about the reason for the meeting; that the meeting——

Mr. Stedman: Was Mr. Sugarman there? Was he present?

The Witness: I can not tell; I don't know sure if he was in the crowd or not.

Mr. Stedman: Object to any statement, except when the defendant was present at the meeting, or made by the defendant himself.

The Court: Unless reference was made by Mr. Sugarman in his speech to what this other man said.

The Witness: I think that the first speaker spoke about Mr. Sugarman not being there yet.

Q. When he came, then he started to speak, did he?

A. I think he did, yes.

Q. Tell what you can recollect of what he said.

A. Why, he spoke against——

14 Mr. Stedman: Object to that. Is the witness beginning to tell his opinion?

The Court: State as near as you can the exact words that he used, or, if you can't give the exact words that he used, give them as near as you can.

The Witness: Why, I know what he was talking about. He talked about the war.

Q. What did he say about it?

A. He talked against war.

Mr. Stedman: Just a moment. I think I will object to that. The court has cautioned the witness. May the answer be stricken out?

The Court: You should state as nearly as you can, what he said. When you say "He talked against war," that may be meaning one thing to you and another thing to the jury. We want you to give what he said—the words.

The Witness: He told us that he was against war, all wars, and he didn't believe in war. He referred to different wars, and the present war; and also in regard to the draft, that this was not the first time people were drafted, that there were times before that people were drafted in the war, and that the common people had to give their lives. And he also spoke about things that impressed me. He spoke

about an instance at the time of the Civil war, that I had never heard of, that impressed me; that there was a community out in
15 Maine that resisted the draft, and that the authorities let them alone, that they never had to go, and that they lived peaceful in that community. And I had never heard of it before; and this had happened during the time—Abraham Lincoln's time. And he also spoke about the Revolutionary war, and that those wars should not have been. And he referred to George Washington, and that impressed me; that George Washington was a land-owner, and that, the way I understood it, that that was the cause of our war at that time.

Mr. Stedman: Object to his understanding.

The Court: State as near as you can what he said.

The Witness: He said that George Washington was a big land-owner, and that it was the same today as at that time, that the common people had to give their lives for the richer—rich men. And then he spoke about the—certain amount that he mentioned, in St. Paul, that didn't register, and about arresting—I don't know how many, a certain amount of people—a certain amount of people to be arrested—what it meant to arrest a certain number of those people, that they would not have room enough for—would not have room enough in jail to arrest them. And he also spoke about—referred to that particular meeting—about a conscription officer coming out here and arresting this crowd; and he made the statement that "he would have a hell of a time to arrest them." I didn't stay until the end of the speech, I had to go on account of illness in my family. That is all that I can remember of the statements that were made—personally.

Q. Did he speak about the present war?

A. Why, yes.

16 Q. In what way did he speak about that?

A. Why, he spoke as if he——

Mr. Stedman: The way that question was asked, would call for a conclusion of the witness. Objected to.

The Court: State what he said.

Q. What he said.

A. Well, he talked about that he didn't believe in this war, or in any war.

Q. Did he say anything about our government, and, if so, what?

A. Why, he spoke about this—sending our people over to France, was wrong, didn't believe in it, and that the government had no right to send our men over to France; about being shot in France, might just as well be shot at home.

Q. In what connection did he use that expression, do you remember? What did he say in connection with that remark?

A. Why, I can't just be able to tell—at least I—that it was not right to go across the water to France.

Q. Did he say anything about our government, as to whether it was a free country or not?

Mr. Schwartz: Objected to——

The Witness: Why, he made the statement that this was not a free country, that the common people had nothing to say, they were merely drafted, had nothing to say whether they wanted to or not.

Q. Have you finished your answer.

A. I think I did—yes.

Q. Mr. Sander, in the crowd there, what proportion of that crowd, in your opinion, and according to your estimate, was young fellows, or young men of registration age, that is, between twenty-
17 one and thirty-one.

A. What was the proportion; I didn't meet all the people there. The proportion I met of men was ten or twenty per cent.

Q. Where was the meeting held?

A. At the town hall, John Seaman's place.

Q. Was it in the hall?

A. No, outside, in the door-yard.

Q. Was it light, or——

A. Why, no; they had a lamp—the only light they had.

Q. This was about half-past ten at night, when Sugarman came?

A. I think it was 10:30 or 11:00.

Q. Did you notice when he first came there a number of automobiles around there?

A. Yes.

Q. Can you give any estimate of the number of those?

A. Why, there was an immense lot, I imagine two hundred.

Cross-examination of Rutherford L. Sander.

By Mr. Schwartz:

Q. Mr. Sander, you say that the meeting-place was out of doors, and it was dark?

A. Yes.

Q. And the only place there was light was the platform; is that correct?

A. Yes.

Q. You didn't hear all of that speech. Is that a fact?

A. No, I didn't.

Q. So you don't know what the summing-up, or conclusion, of that speech was?

A. I do not.

Q. What time in the evening did you leave this meeting-place?

18 A. Why, I listened about twenty minutes.

Q. You don't know how long that speech was?

A. I do not.

Q. You don't know what qualifying statements or what other statements he made?

A. No, do not.

Q. When you left, did anybody leave with you?

A. My brother, yes.

Q. The young man who came out with you?

A. No, he is an old man, older than I am.
Q. Were there any questions asked of the speaker, the defendant, at the time you were there?
A. No.
Q. Did you talk about this afterwards, this speech,—meeting that took place out there?
A. On the way home.
Q. Talk to your brother?
A. Yes.
Q. Did you talk to others?
A. Why, yes.
Q. At the meeting, place of meeting?
A. No, didn't speak to anybody at the meeting--after that—I left them.
Q. You had spoken frequently to people about this meeting, since that night?
A. Why, when we get together, yes, talk over these things.
Q. What do you mean by "when we get together"?
A. The people around in the community.
Q. In Arlington?
A. Yes, at the store.
Q. Are you well acquainted with all the people, or most of the people at Arlington?
A. Yes.
A. Now, do you know Mr. McGovern?
A. Yes sir.
Q. Do you know whether it was he who asked you, that is, suggested, going out to this place of meeting.
A. No sir.
Q. You had talked to him about this meeting?
A. I didn't.
19 Q. Do you know whom you talked to before you went to this meeting?
A. My brother.
Q. Was he the only person?
A. Why, yes, the only one that I talked to about going to the meeting.
Q. You didn't hear about the meeting from anybody else?
A. Yes, I heard rumors of the meeting out there.
Q. You don't remember from whom?
A. No, I don't remember.
Q. Might have been Mr. McGovern?
A. No, he was not in town; I didn't see him.
Q. Didn't see him at all?
A. No.
Q. Did you see a petition that was circulated or presented, at that meeting?
A. Yes sir.
Q. Did you have a copy of it?
A. No, it was read.
Q. Do you know to whom that petition was addressed?

A. I, do not. He read it, but I didn't pay any attention. I listened to the reading of the particular petition.

Q. Was this petition—You say you don't remember for what purpose or to whom that petition was to be presented?

A. Why, certainly, yes.

Q. To whom?

A. To the people right there.

Q. These people were asked to sign the petition?

A. Yes sir.

Q. To whom was the petition to be sent when it was read?

A. It was addressed to somebody, or to be delivered to some people. I signed it with the intention of having it sent to Washington.

Q. You signed that petition?

A. Yes sir.

Q. And when it was read to you you knew it was designed for the purpose of petitioning Washington?

A. To repeal the Conscription Act.

20 Q. And you signed that?

A. Yes.

Q. And was that immediately before the defendant came there to speak?

A. Yes sir.

Q. And who was it that had presented or read that petition?

A. A fellow by the name of Dunham, editor of "Dunham's Doings."

Q. Now, Mr. Sander, you have given us your version of some of the things that the defendant spoke about at that meeting. As a matter of fact, in the twenty minutes he spoke about other things besides what you have testified; isn't that a fact?

A. Why, might have been longer.

Q. I am just taking your estimate, whatever time it was there. As a matter of fact, didn't the defendant in his speech say that he did not come there for the purpose of talking about the war?

A. I think it was the only purpose, as much as I got out of it.

Q. I am asking you whether or not he didn't say that?

A. Not that I heard of.

Q. As a matter of fact didn't he speak upon an entirely different subject than the subject of war?

A. Why, no.

Q. You heard nothing except that one subject?

A. Against the war, yes.

Q. As a matter of fact didn't he discuss certain economic questions?

A. Yes.

Q. That had nothing to do with the war?

A. I thought it had something to do with the war.

Q. I am asking you whether he didn't discuss economic questions, outside of the relation to anything else?

A. I don't know, I don't know what you mean.

21 Q. Did he talk about the rights of the working people?

A. Yes, sir.
Q. As to wages, and things of that kind?
A. No, not as much as I heard of it.
Q. You heard nothing about that at all?
A. He might have spoken about it later.
Q. I mean while you were there. I am trying to find out everything that you heard there. You only heard part of it, as far as your testimony goes. In estimating the length of time that you were there, how do you arrive at that, how do you know just how long you were there?
A. I had no watch with me.
Q. As a matter of fact you might have been there only ten minutes?
A. I know better.
Q. You think you were there longer?
A. Yes. I never carry a watch.
Q. How long were you there before the defendant came to this place of meeting?
A. I imagine about an hour and a half.
Q. Now, when you arrived home that night what time was it?
A. Must have been a little after twelve.
Q. Did you go directly home from this place of meeting?
A. Yes, sir.
Q. And how long did it take you to get home?
A. About twenty minutes—fifteen.
Q. Can you state more definitely when you came home? Have you any recollection?
A. No, I have not.

(Witness excused.)

22 GARRETT W. WOLTER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. Jacques:

Q. Where do you live, Mr. Wolter?
A. Arlington, Minnesota.
Q. How long have you lived there?
A. The last seven years.
Q. What business are you in there?
A. I am in the livery business at present.
Q. How old are you, Mr. Wolter?
A. I am twenty-seven years old.
Q. Did you register under the Draft Act?
A. Yes sir, I did.
Q. Have you your registration card here?
A. Yes sir.
Q. Will you let me see it? Witness produces a card and hands

same to the district attorney, which card is marked for purposes of identification Plaintiff's Exhibit A.

Mr. Jacques: Offer in evidence this registration card, Exhibit A.

Mr. Stedman: Objected to as incompetent, not admissible under the proofs in this case. The question whether this man is registered or not is not in issue.

Mr. Jacques: I think it is very material.

The Court: It tends to show the character of the audience, if that becomes——

Mr. Stedman: But he testifies that he was of registerable
23 age. That would answer the question.

Mr. Jacques: Withdraw the offer at the present time.

Q. You say you had lived seven years at Arlington?
A. Yes, sir.
Q. Did I ask you what your business was there at Arlington?
A. Yes, sir.
Q. Were you living there on the 24th day of July last?
A. Yes, sir.
Q. And did you learn of that meeting to be held at Kelso Township on that night?
A. I did.
Q. Can you tell the jury how you learned of that meeting?
A. The way I learned, seen so many cars going in town and stopping and inquiring where Kelso Township was.
Q. Did you see any bills announcing the meeting at Kelso Township town hall?
A. I did not.
Q. Did you attend that meeting?
A. I did.
Q. How did you come to attend that meeting?
A. Mr. McGovern, "Johnnie" McGovern, and his brother Joseph and Mr. Louis Kill——
Q. How did you folks go out?
A. By car.
Q. By that you mean automobile?
A. Yes, sir.
Q. You keep autos at your livery stable?
A. We do.
Q. That is a part of your business. What time did you go out?
A. About 8:30 or 9:00, something like that.
Q. What time would you say you arrived at the meeting?
A. Might have been nine, or a little after.
Q. How many people were there according to your best judgment, when you arrived?
A. Oh, around four or five hundred.
Q. Did you take any notice of the number of automobiles that were out there at that meeting place?
A. Just took a glance.
Q. Give any idea of those?

A. About two hundred—two hundred fifty.

24 Q. Was the meeting going on when you arrived there? Had it been called to order?

A. They were just standing around talking to each other.

Q. Did you stay at that meeting until Mr. Sugarman arrived?

A. I did.

Q. What proportion, in your judgment, of that crowd was young men of registration age under this military act, between the ages of twenty-one and thirty-one?

A. All of fifty per cent.

Q. Did you see any young men there whom you knew were registered?

A. Well, I see some—kind of dark, did not see very many.

Q. Name those that you saw.

A. I seen Wesley Beseke, and a fellow by the name of Henry Von der Brelje.

Q. Who else?

A. Can't remember just at present.

Q. You don't remember any other name now?

A. Not at present.

Q. Besides those you have given. What time was it when Mr. Sugarman arrived at the meeting, according to your judgment?

A. About 10:30 or 11:00 o'clock.

Q. And he immediately commenced to speak after his arrival?

A. He did.

Q. Did you hear all of his speech?

A. Well, I was there all the time, only I didn't pay particular attention to it. I heard parts of it.

Q. Can you go on and tell the jury what he said, according to your best recollection of the things that he said that you remembered?

A. It is a little hard for me to explain just the way he said—except parts of it—what he was saying about——

Q. Go on and state it as well as you can.

25 A. He was talking about registering; he said that all these young men that had registered, those that was called for military service, if they refused to go, and they would all stick together, that there was nothing to it, that they would not come and get them people and lock them up, because they didn't have room enough in the jails. And then he was telling about conscription officer come along try to arrest the crowd was there, that he had a hell of a time to do it; he was telling them about a free country, he says, "Like hell it is." And he was telling about how many people that didn't register in St. Paul, that there was over 5,000 that didn't register, that there was one now and then that they caught, but not very many.

Q. Did he say what class of people they were, those 5,000?

A. Said mostly Socialists. He was telling about the wars we had before, about conscription there, and some people didn't register at that time, that they never was made to go, and never did go.

Q. Did he say where that was?

A. I don't remember where he said it was.
Q. Did he say what war that was in?
A. Well, he had mentioned two wars, Revolutionary war, and Civil war, so I didn't pay just very particular attention to that. He was telling the people that this was not right to make the young men from this country go across the water, to fight there, and told them that if they wouldn't go they at least would not be shot in France.
Q. Was there anything else that he said?
A. Hard to think about just now.
Q. At the time Mr. Sugarman started speaking, how many
26 people would you say there were there?
A. Oh, considerable more than when I came there, might have been around 800, maybe, more or less; could not hardly judge a crowd when it is dark.
Q. What class of people was it at that meeting, neighborhood meeting?
A. They were from all over—neighbors, and come as far as Henderson, some from New Auburn, some pretty near all the way from Glencoe.
Q. How far is Glencoe from Kelso?
A. About 24 or 25 miles.
Q. What was the occupation of these people mostly?
A. Mostly farmers.

Cross-examination—Garrett W. Wolter.

By Mr. Stedman:

Q. Were you personally acquainted with them?
A. With some of them, yes.
Q. How many out of those 800 did you know?
A. It is hard to tell.
Q. 50, 75, 100? Approximate it.
A. Around that, yes.
Q. Were all those farmers that you knew?
A. Not all of them, no.
Q. Those that you didn't know, what was their occupations?
A. Well, according to my judgment they were all farmers.
Q. What do you base that on, observation?
27 A. Well, I know that there was several machines from out of town.
Q. You said about two hundred machines?
A. Yes.
Q. Would you say those machines accommodate on an average four?
A. Figure all the way from three to four.
Q. What average age were they—over 30 years of age?
A. 30, there was about, oh, one-third.
Q. Any women there?
A. Very few.

Q. What time was it that you were approached for the purpose of using your automobile?
A. Well, it was after eight o'clock.
Q. Who called for it?
A. Mr. McGovern.
Q. In person?
A. Well, we just were ready to go out there at the time.
Q. Did Mr. McGovern call at your place?
A. Yes sir.
Q. You were starting when you met him?
A. No sir, had not started yet.
Q. He asked you to take him out there?
A. Yes sir.
Q. Did you know his position at that time?
A. No sir.
Q. You didn't know he was representing the government?
A. No sir.
Q. Or secret service agent?
A. No sir.
Q. Did he talk with you going out?
A. Not very much.
Q. How far was it from where you were to this meeting?
A. Oh, about 8 miles.
Q. Did you go out of curiosity to the meeting? Were you going there before Mr. McGovern met you?
A. We intended to go, yes.
Q. Why did you intend to go to that meeting?
A. Wanted to see what was going on.
Q. And you arrived, you say, about 9:30?
A. Around nine o'clock, may be a little later.
28 Q. And you paid no particular attention to the speech when it was being made?
A. Well, there was another fellow there that was speaking before Mr. Sugarman.
Q. I mean when Mr. Sugarman spoke. I understood you to say you did not give him much attention. Is that right?
A. Part of the time I did, and part of the time I didn't.
Q. Half of the time you didn't, or, would you say you did?
A. Can't say half of the time.
Q. What percentage of the time did you pay attention?
A. Was there all the time. But I was a little hard of hearing at the time.
Q. How far were you from the speaker?
A. Oh, about 15 or 25 feet.
Q. Did you remain there all the time he was talking?
A. Once in a while I went over to the car.
Q. While Mr. Sugarman was there how frequently did you leave that place, while he was speaking, how frequently did you walk away?
A. I think about two times that I walked away.
Q. Why did you go over to your car?

A. To see nobody was going to play tricks with the car.
Q. Wanted to see if it was still there. Then you came back?
A. Yes sir.
Q. Did you go to the same place ten or fifteen feet from the speaker's stand?
A. Might have went a little farther over.
Q. How far then?
A. About thirty.
Q. Then where did you go?
A. Oh, stood around there for quite a while.
Q. But you went to different parts of that meeting?
A. Yes sir.
29 Q. And Mr. McGovern did too, didn't he?
A. Yes sir.
Q. And Mr. McGovern went to different parts of that meeting and to ask questions of the speaker, didn't he?
A. He asked a couple of questions.
Q. He asked a question at one place, and then moved to another place and asked questions, didn't he?
A. He didn't move very far.
Q. He moved some? I am not saying how far, but he did move, didn't he?
A. Yes, he moved, because the crowd kept pushing.
Q. When he moved to a new place he asked questions, didn't he?
A. Can't say that I heard; was not with me all the time.
Q. Were you near him when he was asking questions?
A. No, Mr. McGovern, secret service, his brother was with me.
Q. Were you near Mr. McGovern of the secret service when he was asking questions?
A. I can't remember just——
Q. Do you remember his asking questions?
A. He did ask questions.
Q. Do you remember anyone else except Mr. McGovern and his brother asking questions?
A. I heard different people asking questions.
Q. Where was Mr. McGovern when you say different people asked questions? Were you looking at him?
A. No, I was not.
Q. He asked a question near where you were, one of them, didn't he?
A. Can't say whether he did or not.
Q. Were you standing near him when he asked any question?
A. Don't remember.
Q. Do you know whether he asked any question?
A. Yes, I know. I heard him ask a question.
Q. You heard his voice, you mean; is that right? Did
30 you hear his voice?
A. Why, I think I did.
Q. Well, what other method, if it was not from that? How do you know he asked questions?
A. It is so long ago I can't just exactly remember any more.

Q. Do you know whether you recognized his voice—whether you recognized him from his voice, or saw any expression upon his face, or anything else, that indicated to you that he was the one asking the questions?

A. It is hard to tell. He might have——

Q. Did you know his voice?

A. Yes, I could tell his voice, learned that good enough in a couple of words.

Q. You knew his voice?

A. Yes sir.

Q. How long had you known Mr. McGovern?

A. That is the first time I ever met him, that evening.

Q. And he got into your vehicle and rode to the meeting?

A. Yes sir.

Q. And he was standing how far from the speaker when you recognized his voice?

A. Well, the same distance; he and I had been standing together, only not always with me.

Q. Did he ask the first question when he was near you?

A. Don't remember.

Q. Just refresh your recollection a minute. Is it not a fact that the first question he asked, he was standing near you and his brother was there at the same time?

A. I can not say at present now.

Q. You won't say it is not so, would you?

A. I can't remember. He asked a question.

Q. What is that?

A. He asked a question, but I can't say where he was.

31 Q. Didn't he ask more than one question?

A. He might have, yes.

Q. Didn't he ask more than two questions. Didn't he ask more than three questions?

A. I can't swear to that that he did.

Q. Do you recall his asking the question, "Mr. Sugarman, what would happen if a government official should come here and arrest all these people? What would you advise us to do," or in substance that question? What is that?

A. Something of the kind that was; I don't know just what it was.

Q. Wasn't it in reply to that that the speaker said "He would have a hell of a time"?

A. That was his brother.

Q. Which questions did Mr. McGovern ask, and which ones did his brother ask?

A. That is just it; I got mixed up between the two of them.

Q. Mr. Wolter, can you tell any other person that asked questions, except Mr. McGovern and his brother?

A. Yes sir, I can.

Q. Who is it?

A. Mr. Beseke.

Q. Does he live out there?

A. Yes sir.
Q. Was he talking with you?
A. Not to me.
Q. Was he near you?
A. He was talking to—around there where Mr. Sugarman was, talking after the speech was over, with Sugarman; there was more than one standing there, standing around in a circle.
Q. After the speech was over, Mr. McGovern met Mr. Sugarman, and asked him some questions then?
A. Yes.
Q. During the meeting, in the open questions, was there any question asked, except that by Mr. McGover*b* and his brother—those three persons?

32 A. There was different people that asked but I could not say who they were.

Q. You don't know who they were?
A. No, they were strangers.
Q. How many questions were asked?
A. Could not say.
Q. Can you tell any one of the questions—the substance of it?
A. I don't remember just now.
Q. Did Mr. McGovern tell you why he was going there?
A. Why, he said that he would like to go out to the meeting there.
Q. When the reference was made to a refusal to register, wasn't that in answer to a question—You have stated that the speaker made some reference to the effect of the refusal to register. What did he say, "report, register, or enlistment?"
A. That is, "to report for enlistment."
Q. Was that in response to a question?
A. I don't know what you mean.
Q. Did someone ask a question, and did his reply to that, come back as an answer to the question?
A. No, I don't think it did; might have, though.
Q. Do you know anyone there who was in the military service of the United States, that is, enlisted, enrolled?
A. Not that evening, no.
Q. Will you tell us just what he said immediately preceding or following or substantially around the word "Socialists?"
A. I can't just exactly tell it.
Q. Have you talked over your testimony in this case with anyone?
A. No sir.
Q. You have not talked with Mr. McGovern?
A. I have, yesterday, yes.
Q. And you talked it over to refresh your recollection?

A. We talked, but not very much, about this.

33 Q. But you talked some about it, didn't you?

A. A little.

Q. The little you talked about it, was this in reference to your testimony?
A. Not just exactly.

Q. Did he ask you what you remembered?
A. Just asked a question, If you know this yet, that he said it, or if he didn't.
Q. In other words he asked you, "Do you remember this?" "Do you remember that?" did he?
A. Only asked a couple of questions, that is all.
Q. How long were you talking together?
A. Not very much at all.
Q. What two things did he ask you if you remembered, what couple of things?
A. Why, he asked me if I remembered how many cars there were there, that is one; and he asked me if I would remember of how many there was there that had registered, that I knew of.
Q. If you remembered how many had registered that you knew of there. Have you talked with those parties?
A. No, didn't.
Q. What is that?
A. No.
Q. Do you know where they are now?
A. Which parties do you mean?
Q. The parties you referred to that registered?
A. Yes, I know where they are.
Q. Have any of them been called?
A. Why, not that I know of yet.
Q. You don't know whether they have been called?
A. One in a different district.
Q. You don't know whether they have been called, do you?
A. But they have not gone, I know that.
34 Q. Do you know whether they have been called, I ask you?
A. I don't think so.
Q. Did he ask you any other questions?
A. No sir.
Q. That was all?
A. That is all.
Q. How long was he speaking during this address?
A. Up to the time he quit.
Q. What time did he start?
A. He started immediately after he got there.
Q. What time did he get there?
A. Either ten thirty or eleven o'clock. I didn't have no watch with me.
Q. How long did he speak?
A. They was up to pretty near twelve o'clock.
Q. And he talked anywhere from an hour to an hour and a half?
A. All of that.
Q. You have told all that you remember of that hour or hour and a half address?
A. I suppose there was a lot more that I heard, that I can't remember.

(Recess.)

Redirect examination of Garrett W. Wolter.

By Mr. Jacques:

Q. You say you remember Beseke asking a question?
A. Yes.
Q. I understand that was after the meeting was over?
A. After they were through speaking.
Q. Who was that that he asked a question of?
A. Of Mr. Sugarman.
35 Q. What Beseke was that?
A. Wesley.
Q. He was one of the registered boys?
A. Yes sir.
Q. What was that question? Did you hear it?
A. He asked the question, what he advised him to do if they were called for examination, and he said not report at all.

Recross-examination of Garrett W. Wolter.

By Mr. Stedman:

Q. Who was present at that conversation?
A. There was more than——
Q. Name the persons that were beside you.
A. That is the only one I knew, the rest of them were strangers to me.
Q. Where was this conversation?
A. It was right there by the town hall there at Kelso.
Q. Which direction from the town hall?
A. A little bit northwest, on the farmers' road.
Q. Can you describe any of the persons present there?
A. No, I can not.
Q. You don't know a single individual who was standing with you at that time?
A. No sir, they was just standing back of Beseke, and the rest of them were strangers to me.
Q. How far were you from Mr. Beseke when he asked the question?
A. Standing right behind him.
Q. You don't know anyone else back of you, or at your side, or in front?
36 A. They was all strangers, standing around there.
Q. How many lights were there there, or lamps?
A. Just one.
Q. How far were you away from that?
A. Oh, about ten feet, at that time.
Q. Was there a crowd there?
A. The crowd was just ready to leave.
Q. Was there a crowd around Mr. Beseke when he asked about that question?
A. About fifteen standing around.

Q. All standing around at that time?
A. Yes sir.
Q. You felt hostile to that meeting, didn't you?
A. I don't know what that means.
Q. Were you opposed to it?
A. "Opposed?" That is another word I can't answer yet.
Q. Were you joyous at the meeting, happy at the meeting?
A. Why, I don't know. I was just like I always felt.
Q. Always feel the same way?
A. I didn't feel happy and I didn't feel sorry about it.
Q. Did you ask any questions?
A. No sir, not a one.
Q. What time did Beseke ask the question?
A. That was a little before twelve o'clock, five or ten minutes before; I can not tell.
Q. What?
A. I could not tell you that exactly.
Q. Where is Mr. Beseke now?
A. He lives on a farm there.
Q. Do you know whether he is here in this room, or been called as a witness?
A. No.
Q. Have you talked with him about this?
A. No, never did.
Q. Have you talked with anyone about his question or testimony?
A. No sir, did not.
37 Q. No one?
A. No one.
Q. Didn't talk with the District Attorney?
A. I did talk to him, yes sir.
Q. When?
A. Yesterday.
Q. Where?
A. Here in this town.
Q. Didn't tell him about this—what you have just testified?
A. I don't remember whether I did or not.
Q. You don't remember a conversation that took place yesterday with the District Attorney. Is that true?
A. I could not remember if I mentioned that question.
Q. Do you remember mentioning that to anyone?
A. No, I didn't mention to nobody else. If I did mention it I mentioned it to him yesterday.
Q. In other words, you never mentioned it to anyone. Is that right?
A. No, I did not.
Q. And you don't remember now that you mentioned it to him?
A. Just as I say, I might have mentioned it and I might not.
Q. But, I say, you don't remember?
A. No, I don't.
Q. But you remember perfectly what was said on July the twenty-fourth?—a little before twelve o'clock?

A. Yes sir, just the particular thing. I was standing right behind——

Q. You remember that?

A. Yes, I do.

Q. You don't remember what was said yesterday?

A. We were in a bunch talking together, different things, could not tell you exactly.

Q. You can't tell anything else that was said when the bunch was talking?

A. I can remember a lot, if I pay particular attention about it.

38 Q. Tell us something else that was said at this conversation when these people were around Beseke.

A. Why, there was not much more said, just asked that one particular question.

Q. That question was answered, and you remember nothing else; is that true?

A. I didn't listen very good, because he just asked that one question. I thought I was going to hear what the answer was.

Q. You were standing back of him?

A. I was not standing there very long.

Q. How long, five minutes?

A. Oh, about two minutes.

Q. About two minutes. Then did you move away?

A. Yes.

Q. You just come in about that question and got away?

A. I was standing there, and the crowd moved away toward me, and he asked the question.

Q. Did you hear any other statements made by anyone in that gathering a little before when this question and that answer was made?

A. No, that is the only question.

Q. Did you hear anything else that was said?

A. I do not remember.

Redirect examination of Garrett W. Wolter.

By Mr. Jacques:

Q. You say, Mr. Wolter, you registered?

A. Yes sir.

Q. Under this law?

A. Yes sir.

Q. Same as Beseke had?

A. Yes sir.

39 Q. And you had a particular interest in that particular question, didn't you?

A. I did.

Mr. Stedman: Objected to——

Mr. Jacques: Withdrawn.

(Witness excused.)

LOUIS KILL, being first duly sworn, testified as follows on behalf of the plaintiff:

Examination-in-chief.

By Mr. Jacques:

Q. Where do you live?
A. Arlington, Minnesota.
Q. How long have you lived there?
A. Born and raised there. Lived there all my life.
Q. What is your business?
A. I am a publisher of a newspaper.
Q. What is your paper?
A. The Arlington Enterprise.
Q. How long have you been publishing that paper?
A. About six months.
Q. How old are you?
A. 26.
Q. Did you register under the draft act?
A. Yes sir.
Q. Have you your registration card?
A. Yes sir.
Q. With you, so you can produce it?
A. Yes sir.
Q. Did you live at Arlington on the 24th day of July, 1917?
40 A. Yes sir, I did.
Q. You know about this meeting that occurred at Kelso the night of the 24th?
A. Yes sir.
Q. When did you first hear about it?
A. I heard about it about seven o'clock that evening, after I got up town.
Q. How far is Kelso Township from Arlington?
A. About five miles, I guess.
Q. Was that the first you heard about the meeting?
A. That is the first I heard of it.
Q. Whom did you hear it from?
A. Why, I think I heard it from another gentleman in town there, name is Bowers, Elmer Bowers; I am not sure, but I think he is the first one that told me there was a meeting.
Q. Did you go to the meeting?
A. Yes sir, I did.
Q. How did you happen to go to the meeting?
A. I went out with Mr. Wolter and John McGovern and Grover McGovern.
Q. You say "Grover" McGovern?
A. Joe McGovern, I meant to say.
Q. Who did you see about going out there, first, that evening?
A. Why, I met Mr. Wolters just about the time I found out there was a meeting. I went there, and we decided we would go out, later on, out of curiosity.

Q. When did you first see the McGoverns that evening?

A. It was sometime after I met Wolters. John McGovern is a friend of mine, always was, I happened to travel in the same crowd, I guess, more than anything else, and we got to speaking about this meeting out there; he decided to go out with Wolters and I.

41 Q. What time did you start out, do you know?

A. I guess about 8:30.

Q. Could you fix about the time when you arrived at the meeting?

A. Well, I understood at the time it was about seven or eight miles out there; must have got there about nine o'clock.

Q. How many people were there when you arrived, at nine o'clock, according to your estimate and judgment?

A. Why, there were around a thousand, on both sides of the road leading up to the town hall, where the meeting was held, for a distance of about a quarter of a mile. Quite a number of cars were parked in a farm yard; must have been 250 cars there.

Q. How many people?

A. Five or six hundred, I should judge.

Q. What was the condition as to darkness, or was it dark or light, at nine o'clock?

A. Why, it was light when we went out there, I think.

Q. Did you stay there until Mr. Sugarman came to the meeting?

A. Yes sir.

Q. What time was it when he came?

A. Must have been around eleven o'clock.

Q. Was it a light night or dark night?

A. It was not very dark,—I don't think it was.

Q. What do you think was the size of the crowd at eleven o'clock, when Mr. Sugarman came?

A. Why, I think there were—I think most of the crowd was there when we got there; the crowd was not much larger after we got there.

Q. About the same size, would you say?

A. Perhaps there were a few more when we got there.

Q. Did you hear Mr. Sugarman's speech?

A. Yes sir.

42 Q. Can you tell the court and the jury so much of it as you can remember?

A. Why, he spoke of Socialism, war generally, this war and other wars; spoke of the Revolutionary war and the Civil war, and the present war, and the Conscription Act.

Q. For instance, what did he say about the Revolutionary war?

A. Why, he mentioned something about the Revolutionary War being a commercial war, the same as all the other wars, Civil war and the present war.

Q. Did he say anything about any of the leaders of the Revolutionary war?

A. I think he mentioned George Washington's name.

Q. In what way? What did he say about him?

A. I don't know just what he did say about him.

Q. You don't know. Go ahead and tell what else you heard him say.

A. Spoke of conscription in the Civil war, and mentioned a small town in Maine where they refused to be conscripted; the town seceded from the Union, he said, and remained so forever after. He also said 5,000 Socialists refused to register at St. Paul under the present conscription, and they were not molested by the government, and he advised——

Mr. Stedman: What he said.

The Witness: Told the young men that if they didn't respond to the call for examination here the consequences would not be any worse than to be shot in France.

Q. Anything else?

A. Also that if they would all stick together the conscription officer would have a hell of a time, with a crowd like the one present that night. He also said that President Wilson's campaign slogan was "He kept us out of war," and he had made up his mind
43 to plunge us into war before he was elected. That is about all I remember just now.

Q. Did you hear him say anything about our government, as to being free, or otherwise?

A. Why, I think he dwelt on that subject in his talk. I don't remember just what he said.

Q. How did the audience there, at the meeting, receive what he said, how did it seem to strike the audience?

Mr. Schwartz: Objected to, calling for the conclusion of the witness.

The Court: He may say what the audience said or did.

Mr. Schwartz: Oh, yes.

The Witness: I didn't hear them say anything. They applauded several times, hand-clapping, shouting.

Q. Did you see any young men that had registered for the draft there that you knew? If so, state their names?

A. Yes, sir. Wesley Beske was one of them, lived near Arlington there; and also several Weckworth boys there that evening that I saw.

Q. How many Weckworth boys?

A. Two, I think.

Q. Do you know their first name?

A. I am not sure of their first name, but I think Ed and Paul Weckworth.

Q. Any more?

A. That is all, I guess.

Q. Of course you saw John F. McGovern at the meeting?

A. Yes, sir.

Q. Now, Mr. Kill, what proportion, as near as you can estimate it, of that number of people there were of registration age, between twenty-one and thirty-one?

A. I think nearly fifty per cent. of them were that age.

Q. Did you hear anybody ask questions about—at the meeting?

A. There were quite a number of questions asked after the
44 speaker got through with his talk.

Q. The meeting was still going on, around the automobiles?

A. Yes, sir.

Q. How did that come in that questions were asked?

A. I think he suggested that he would answer any questions that people would care to ask.

Q. Do you remember any of those questions, and the answer he gave to any particular ones?

A. I remember one that was asked—I am not sure whether it is correct; I think one of the men asked him what a man should do if he failed to report for examination, and a conscription officer came along.

Q. What did he say?

A. Why, he said they should all stick together, and the conscription officer would have a hell of a time if he came here tonight.

Q. Do you remember any other question? Do you know who asked that question?

A. Joe McGovern asked it, I think; it sounded like his voice.

Q. What other question and answer do you remember?

A. That is about the only one that I paid particular interest in.

45 Cross-examination of Louis Kill.

By Mr. Stedman:

Q. What percentage was below twenty years of age?

A. Below—don't remember of seeing anyone out there below that age.

Q. What percentage was above 31 years of age?

A. Why, there was a sprinkling of older people in the crowd, that I noticed.

Q. When you speak of old people, you mean those over 31?

A. Quite old, that I would consider—those that were quite old and those that were not so old.

Q. Say those between 31 and 75, what would you say they would average?

A. Oh, perhaps 10 or 15 per cent.

Q. And how far were you from the speaker?

A. Why, I should judge about 25 or 30 about, something like that.

Q. Who was standing with you?

A. I was moving around in the crowd, talking to everybody.

Q. While the speaking was going on?

A. Yes, before and after, during the talk, too.

Q. Did you see Mr. McGovern there?

A. Yes, sir, I did.

Q. Did you hear him asking questions?

A. No, didn't hear him ask any questions.

Q. Didn't hear him ask any questions. You were not near enough; you don't know whether he asked any?
A. I don't know.
Q. Was John McGovern near you?
A. Why, I spoke to him several times while we were out there.
Q. Do you know whether he asked any questions?
46 A. I don't know whether he asked a question. I didn't hear him.
Q. After the last question was asked where did you go?
A. Went to our car, I think, and went home.
Q. Who did you go with?
A. The same gentlemen that I came out there with.
Q. Name them.
A. John McGovern, Joe McGovern, William Wolters.
Q. Go immediately after the meeting was over?
A. Yes, sir. At least I thought the meeting was over when we left.
Q. You have related all that you recall?
A. Well, I suppose there was a lot of things that I heard there that I——
Q. You have related all that you recall?
A. I have, yes, sir.
Q. I understand you to say you are in the newspaper business?
A. Yes, sir.
Q. You are somewhat familiar with Socialist folks in St. Paul, are you not, the old and the young? All the Socialist vote there numbers about 2,500?
A. I don't know. I never paid much attention to the Socialist party or its votes.
Q. Have quite a memory, and never paid any attention to that?
A. I knew they were very strong down there.
Q. And yet, did it strike you peculiar that the speaker should state there were five thousand socialists who failed to register?
A. It did, yes, sir.
Q. That struck you rather peculiar, considering the fact there was only about 2,000, old and young, altogether in St. Paul?
A. Yes, sir.
Q. Isn't it possible you are mistaken on the connection of the word "Socialists" with the statement of "5,000," in that connection?
A. Why, the words—I don't think I am mistaken. I
47 think he said 5,000 Socialists.

Redirect examination of Louis Kill.

By Mr. Jacques:

Q. Let me ask you, in towns out there in that vicinity, like Arlington, do they have any halls, places for public meetings?
A. Yes sir. You mean in the village?
Q. In the village of Arlington, for instance, have they got meeting places there?
A. Fairly good.

Q. And other towns in that vicinity—of Kelso Township?
A. Yes sir.
Q. Was there any bills put up in Arlington calling attention to this meeting?
A. I didn't see any.
Q. You may state whether you know what method was used in calling this meeting together. Just state whether you know.
A. I think——
Mr. Schwartz: Answer "Yes" or "No," whether you know.
The Witness: I don't know.

Recross-examination of Louis Kill.

By Mr. Stedman:

Q. This was the usual place for meetings, was it not, Kelso?
48 —. I never heard of them having any other meeting out there before.
Q. The town meetings were held at this place, were they not?
A. Yes sir, I think—officers of the town would meet there to transact their business.
Q. It was an open, public, free-for-all, that is, as far as attendance went?
A. Yes sir.
Mr. Schwartz: There is a town hall at this place where the meeting took place?
The Witness: Yes sir.
Mr. Schwartz: This evening they spoke outside?
The Witness: Yes sir.
Mr. Jacques: You say you have lived there all your life?
The Witness: Yes sir.
Mr. Jacques: Did you ever know of a meeting of this size and character having been held, at any time, at Kelso town hall?
The Witness: Never heard of any.
Mr. Schwartz: Do you know that other meetings have been held there, public meetings?
The Witness: No other meetings besides the regular town business meeting.
Mr. Schwartz: Would you swear there was no other public meeting held at that very same place?
The Witness: Would not swear, no sir.

(Witness excused.)

Adjournment to 9:30 a. m., October 25, 1917.

49 *Proceedings of October 25th, 1917.*

Morning Session.

EVALD W. ZACHARIAS, being first duly sworn, testified as follows, on behalf of the plaintiff.

Examination-in-chief.

By Mr. Anderson:

Q. What is your full name?
A. Emial W. Zacharias.
Q. Mr. Zacharias, you are the sheriff of Sibley County?
A. Yes sir.
Q. And you have been such for some time?
A. Yes. I was elected in 1914.
Q. And have held the office ever since?
A. Yes sir.
Q. You are a member of the local board for the County of Sibley?
A. Yes sir.
Q. Local exemption board?
A. Yes sir.
Q. And as such member do you have custody of the registration cards of Sibley County?
A. Yes sir.
Q. Have you those cards with you?
A. Why, yes; they are in the office.
Q. Where are they?
A. At the Marshal's office.
Q. The other day I gave you a list of names, including Martin Blasing, George Sander, Albert Sander, G. William Wolter, Wesley Beseke, Louis Kill, Herman Von der Brelje, Edward Weck-
50 worth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Robert Mesker, and Raymond Mesker. Have you gone through those cards and ascertained whether or not you have a registration card for each one of those names that I have just announced?

Mr. Schwartz: Objected to as immaterial. The witness says they are registered. We are not disputing it.

Mr. Anderson: I want to go a little further, and show that these men were given serial numbers.

Mr. Schwartz: We will concede that.

Mr. Anderson: That each one of these men received serial numbers on the drawing at Washington, on July 20th.

Mr. Schwartz: Yes.

Mr. Anderson: You admit all these men were registered.

Mr. Schwartz: I admit they were registered; that the serial drawing took place in Washington, but that these men, specifically, were not drawn—their serial number was drawn. As to whether they

would be drawn in that allotment of September 5th, or September 1st, and later, we don't know—could not know at that time.

(The witness is excused.)

51 JOHN F. MCGOVERN, being first duly sworn, testified as follows, on behalf of the plaintiff:

Examination-in-chief.

By Mr. Jacques:

Q. Where do you live, Mr. McGovern?
A. I live in Minneapolis, 15 West 22nd Street.
Q. How long have you lived there?
A. For about ten or twelve years.
Q. Where were you born?
A. Arlington, Minnesota.
Q. At Arlington, Minnesota?
A. Yes sir.
Q. Your people live at Arlington?
A. Yes sir.
Q. How old are you?
A. Thirty years old.
Q. Did you register under the military law?
A. I did.
Q. Were you in the draft, included in the names drawn July 20 last?
A. Yes, I was.
Q. What was your number?
A. My number, 3802.
Q. Your order number?
A. 1667, I think.
Q. Where did you register?
A. I registered in the Fourth Ward, Minneapolis.
Q. Have you been called for physical examination?
A. Yes, called for physical examination.
Q. Before or after the 24th day of July?
A. After the 24th day of July.
Q. What was your business?
A. Attorney; now with the Department of Justice, Bureau of Investigation Department of Justice.

52 Q. You say you have been admitted to the bar?
A. Yes sir.
Q. Have an office in Minneapolis?
A. Yes sir.
Q. Graduate of the University of Minnesota?
A. Yes sir.
Q. Where were you on the 24th day of July last?
A. I was in Arlington, Minnesota, and in New Ulm, Minnesota.
Q. Can you state to the court and jury how it happened you were in Arlington that day?
A. I had been notified by Governor Lind that there was to be a

big meeting at New Ulm on the 23rd, I think it was; at any rate I went to St. Peter, drove over to New Ulm, learned there the meeting was postponed because there was to be a circus at New Ulm; on the 23rd I was in New Ulm that day, and saw Mr. Herman Norak, who was in New Ulm that day, who had driven to the circus, saw him at dinner, and he asked me if I wanted to ride back with him to Arlington, which I did; got into Arlington about 7:30; got up to the house or was at the house for a short time, around eight o'clock, and my brother Joe came home; I told him I had been to New Ulm; he said there is evidently some kind of a meeting at Kelso Township.

Q. Officially by the department you had not been selected to go to Arlington?

Mr. Schwartz: Objected to as leading.

The Court: State what the fact is.

The Witness: No, had not been. Just as I say, I was informed by my brother. I came home to see the folks and go back to New Ulm the next day, and was informed by my younger brother that automobiles had been going through Arlington during the latter part of the afternoon, and that evening, and that they all seemed to be headed for Kelso.

53 Q. What time was this?

A. About eight o'clock in the evening, I should imagine. And he said Wolters and himself and some more of them were thinking of driving out, and asked me if I wanted to go along,—or perhaps I suggested I better go along, and see what the meeting was about. He said they were ready to start; so I went down town with him, without even taking off my coat in the house or anything; went back down town with him, and met Mr. Wolter and saw Mr. Kill at his printing establishment, which was on the main street, Arlington; all got into the automobile and drove out to Kelso.

Q. What time in the day did you arrive at Arlington?

A. I should think about 7:30 in the evening. Ate dinner at New Ulm that night. New Ulm must be thirty or thirty-five miles from Arlington.

Q. What time did you folks start for Kelso?

A. About 8:30, I should imagine.

Q. What time did you arrive there?

A. About nine, or a little after.

Q. Was the meeting called to order when you got there?

A. When we arrived noticed there were a great many people about the town hall, and also in the yard, and also a great many automobiles parked on both sides of the road and in the yard; went up into the yard, where the most people seemed to be congregated, and noticed there was a man in an automobile addressing the crowd. I was informed he was a man known as Deacon Dunham.

Q. How large a crowd was it, according to your estimate?

54 A. I should estimate five or six hundred people there.

Q. Did you take any account of the number of automobiles?

A. Yes, we did; we were surprised at the great number of automobiles, and counted them, along both sides of the road, and from that count, and from what we noticed in the yard, estimated 200 to 250 automobiles there.

Q. Of what were the people composed? what occupation?

A. They seemed to be all farmers, practically all farmers, from their appearance I should judge they were farmers. A great many of them I knew to be German farmers who lived in that vicinity.

Q. How long had you lived in that community?

A. Lived there all my life until I left to go to the University, in 1907.

Q. You were acquainted with a great number of those people in that neighborhood?

A. Yes sir.

Q. Would you give an estimate of what proportion of that crowd there at Kelso Town hall were of draft age, between 21 and 31?

A. I should estimate that a large percentage of them were young men, forty or fifty per cent, perhaps.

Q. Did you remain at that meeting until the defendant arrived?

A. I did.

Q. What time was it that he arrived?

A. Approximately eleven o'clock; some time between ten-thirty and eleven, perhaps.

Q. What did he do after he came?

A. We had gone—we had waited so long for him, that we went a little ways from the yard and sat in the automobile, sat there until somebody came out in the yard and said, "Everybody this way," and announced that the speaker had arrived. So we went right out of the machine, got up there, and when we got there he was
55 standing in the automobile and just started his speech.

Q. By the way, did you notice—did you know who was coming? Had they told you who was coming?

A. They had not. This man Dunham announced that for some reason or other the speaker was delayed, and it was necessary to go by auto to get him.

Q. You had gone down to your automobile. How did you come to go back to the meeting?

A. We were just a little ways from the road and some man announced "Everybody this way, the speaker is here," words to that effect, and we came right up with the rest of the crowd; the crowd were just moving up to the automobile.

Q. You had scattered?

A. To the pump, various parts of the yard, and it was announced that the speaker had arrived. We came there as soon as the announcement was made.

Q. Who was the speaker?

A. Mr. Sugarman.

Q. Did you hear the speech there that night?

A. I did.

Q. All of it?

A. All except that—he was talking when I got there. From the nature of his remarks I knew he had just started.

Q. Can you tell the court and the jury about that speech, all that you can remember of the speech, as near as you can, of the language of Mr. Sugarman.

A. When I arrived and had gotten as close as I could get to the automobile, Mr. Sugarman was just reading from a letter which he said had been written by the Secretary of War, that soldiers in uniform should not interfere with meetings, with peaceable meetings, such as had been done in various parts of the United States; and he read that as a sort of a preface; and then he started talking about Socialism; he said, "Now we are plunged in the midst of a terrible war," and he says, "What is it all about?" He said, "If you
56 people had voted for Socialist congressmen, as you had been asked to do, we would not have any war at this time." He said that "the war is a war which has been thrust upon the common people by the capitalistic class, it is a capitalistic war." He said, "Mr. Wilson was elected on the slogan, 'He kept us out of war,' and yet he had made up his mind we should have war." He said, "Mr. Wilson made up his mind we must have war and dragged us into war, and did not consult the common people, and if the common people had been consulted, as they have a right to be consulted, there would be no war." And he turned to his auditors and said, "This is supposed to be a free country. Like hell it is." And there was shouting and hand-clapping and applause. He spoke further along the same line. He qouted from statistics. He said, "This was a war of the rich man," and he said statistics showed that, I forget what per cent. of all citizens in America did not own their own homes, and only a small percentage owned their own homes. He turned to some of his audience and said, "Can you imagine anybody going on and fighting for his landlord?" And he said that "the conscription act was unconstitutional, and that there was no obligation on the people to abide by it." He said there "was no doubt but what when the constitutionality of the question was tested in the courts, and when it was carried to the supreme court, that the act would be declared unconstitutional, and that nobody would have to go across the water." And he said, "Mr. Brandeis," whom he characterized as "the chief justice of the United States," "was a man very liberal in his tendencies, and who would not permit any other decision than the decision to the effect that the act was uncon-
57 stitutional." He said further, he says, "This is not the first time that conscription was ever tried in this country;" he said "they tried conscription during the Civil war. How did it work out?" He said there was "a small town near Augusta, Maine, which said 'we will not be conscripted.'" "What did they do? They seceded from the union." He said "they seceded from the Union and remained out of the Union ever since." And he said "Not one man from that community was drafted during the Civil war, and the reason they were not drafted was because they stuck together; that is an example of what you people can do by sticking together." And he also said, during the course of his speech, that "in St. Paul there

were thousands of Socialists who did not register, and that the government didn't bother them, except now and then one of them is picked up, merely as a sob to the public, or to appease the public," or something to that effect; "but that the rank and file of them were not bothered at all;" and he said "it was just a question of sticking together. Then he said, during the remarks, after the crowd had applauded considerably, he turned to the crowd, and he said, "The conscription officer would have a hell of a time if he came around here tonight, wouldn't he?" which was greeted with more applause. At the end of his speech one of the farmers, who stood right beside me, and a farmer whom I knew by sight, but don't recall his name, asked him, "Do the Socialists generally refuse to register?" and Mr. Sugarman said they did, "there were thousands of them in St. Paul who did not register." Then I said, "If there are so many
58 Socialists who refused to register, why doesn't the government arrest them? His answer was evasive; and he said, "Why doesn't the government arrest them?"—he repeated my question. He said, "They don't arrest them because there are so many of them, they simply don't bother them, they just let them go." Then, I think my brother Joe asked him, "Did you register?" And he said, "Yes, I registered. Do you want to know why I registered?" He said "Yes." He said, "I registered because the leaders of the party discussed my case, and concluded I would be of more value in the party, out of jail, than if I failed to register, and was arrested, and that is the reason that I registered, and it was against my own wish, and it was for the good of the party that I registered." And my brother Joe then asked him out of the crowd, he said, "What would you advise anyone to do, who had registered, if a conscription officer came around to get you?" He said, "All that will happen, your number will be called, and if you refused to respond to your number, you know what will happen to you, but, at any rate, you won't be shot in France." He said, "Does that answer your question?" He says, "No, it does not." He says, "What would you advise us to do?" "Well," he said, "if you people all stick together, like those 5,000 Socialists down in St. Paul, the chances are that the government will not molest you, and," he said, "you will go right along running your farm and raising your pigs just as you are doing today." And at that time, or about that time, the meeting was adjourned, and they started taking a collection, and the people were moving around, and I moved around through the crowd, and the formal part of the meeting was over.

59 Q. Did Mr. Sugarman in the address say anything about federal officers being present?

A. Yes, he did. At the end of this question, when the second question that my brother asked him, when he said about the socialists sticking together, "If you will stick together, the chances are nothing will be done to you," he says, "Does that answer your question?" "I want to say for the benefit of any federal officer that may be in the crowd that I am not advising you what to do, or what not to do."

Q. Anything further said after the meeting adjourned, or stopped, when he stopped speaking, anything said or——

A. No, I didn't hear anything. There was a crowd gathering around the machine, and he made some proposition of establishing a local out there, and a great many people gathered around the machine, and I didn't get up any closer; waited a while, and left.

Q. How long was the speech?

A. I should estimate about an hour, or thereabouts.

Q. Then your party went back to Arlington?

A. Yes.

Q. To what extent was the speech devoted to economics and socialist talk?

A. I think that all through the speech that the question of socialism was the predominant factor in fact, but it was in its relation to the war, and to the fact that—he emphasized that this was a war of classes, and characterized the President as a—on more than one occasion, as a pal and chum of Rockefeller and Morgan, and rich men generally, and said it was a rich man's war; and said "If socialists had been in control of congress there would be no
60 war at this time." It was socialism in relation to the war that he spoke about particularly.

Cross-examination of John F. McGovern.

By Mr. Stedman:

Q. Did you make a memorandum of the meeting, at the time, of the address?

A. Yes, I did, sort of a memorandum.

Q. Have you that memorandum now?

A. I have reports that were—some of those reports that I made to the Department, at Washington.

Q. I want to call your attention, Mr. McGovern, to just one statement that you made, and ask you a question upon it, that in reference to 5,000 socialists not registering in St. Paul. If you have a memorandum on that, I wish you would turn to it, and see whether or not the following were not the case, that he said that "in St. Paul he had heard there were 5,000 that did not register," and then someone interposed asking him a question as to whether they were socialists, to which he replied, "They were all kinds and socialists." In other words, that his answer included people of various political opinions making up the number?

A. I am positive, quite positive, I never so understood him to say they were 5,000 other than socialists.

61 Q. You knew that there were not 2,000 socialists, old, young, and everything else, there in St. Paul, that their highest vote there never was above 2,500?

A. I don't know whether there were 2,000 or 5,000 or 10,000. The whole thing struck me as being peculiar; being in the Department of Justice, I knew there were no such number of any people

in St. Paul that did not register, and there was nothing to the statement, 5,000, or otherwise.

Q. I was calling your attention to it to see whether it was possible you were in position where you could have misunderstood the speaker?

A. I will say the whole proposition struck me as ridiculous.

Q. You knew it was not a statement of fact?

A. Yes, absolutely.

Q. What I am inquiring about, rather, is this; whether it was possible you were in a situation—You appreciate, if you turn to speak to a person, while a man is talking, or reading a paper, that you will drop a word or two; and I am wondering whether it is possible that you omitted a word or two which would change your impression as to the number?

A. My impression was then, and is now, that he said there were 5,000 socialists in St. Paul, and so I made it a subject of my report.

Q. How soon after did you make your report?

A. The next day. I made a memorandum. I went back from Arlington to New Ulm, and made a memorandum on the speech, and then the report was dictated to a stenographer and preserved in that form.

By Mr. Schwartz:

Q. You were employed by the government?

A. Yes.

62 Q. A federal officer at that time?

A. Yes sir.

Q. How many questions did you ask Mr. Sugarman? I don't recall which the question was you asked.

A. I asked why didn't the government arrest them, if there were so many who didn't register.

Q. Were you standing beside your brother Joe when he asked the questions?

A. I was not standing next to him. He moved off a little bit from me when he asked the questions. He did so at my suggestion.

Q. You suggested to him to move away from you, or you suggested to him that he should ask the question?

A. I suggested to him that he should ask the question.

Q. What was the question that you suggested that he should ask?

A. I asked him what Mr. Sugarman would advise to do if a conscription officer came around to get anybody who had registered and who refused to answer his call.

Q. Mr. McGovern, do you remember the time in the preliminary examination, in St. Paul, of this case?

A. Yes sir.

Q. And didn't you testify at that time that up to the time that questions were asked of the speaker, the speech was a typical socialist speech?

A. I did not.

Q. Did you say anything in that connection, I mean up to the

time before any questions were asked, did you say anything in connection—as to the characterization of the speech?

A. I said nothing other than Mr. Sugarman started out the speech as a socialist talk; as I said, he was saying that if socialist congressmen had been in congress, there would have been no war, and so forth.

63 Q. In other words, you said he started out giving a socialistic talk?

A. Yes sir; I said, just as I have said here, that was the character of his speech. I repeated it as I have repeated it here.

(The witness is excused.)

JOSEPH P. MCGOVERN, being first duly sworn, testified as follows, on behalf of the plaintiff:

Examination-in-chief.

By Mr. Jacques:

Q. Where do you live?
A. I live at Minneapolis now.
Q. When did you go to Minneapolis?
A. About two months ago.
Q. Do you live with your brother there?
A. Yes sir.
Q. What are you doing at Minneapolis?
A. Going to school.
Q. What school?
A. Central High School.
Q. How old are you?
A. 18.
Q. Where were you born?
A. I was born at Arlington. Lived there up until two months ago, about two months ago.
Q. Were you living there July 24th last?
A. I was.
Q. Did you know anything about a meeting out at Kelso?
A. Well, there was a rumor that there was to be a meeting there, and there was a stream of cars passing through the town and inquiring the way to Kelso. So we decided to go out to see

64 what was doing.

Q. What time of the day was it that John F. McGovern, your brother, arrived at your home?

A. I was not at home when he came, but I saw him at about eight o'clock, I imagine, about eight o'clock; got home about eight, I think.

Q. Were there any bills of that meeting out at Kelso?
A. I didn't see any.
Q. You just heard about it on the street?
A. I just heard——

Q. Did you see automobiles going in that direction?
A. Yes, I saw a great number of them.
Q. You went out with this party, along with Wolter?
A. Kill and Wolters and McGovern.
Q. Did you talk with Wolter about it that afternoon or evening, anything about the meeting or——
A. No, excepting to tell him we would go out there. I don't imagine he knew it any sooner than I did.
Q. What time was it that you spoke to your brother?
A. About eight o'clock. We went right out; we went up town together; got started about 8:30, or a little after eight.
Q. What time do you think it was that you went out to the meeting?
A. That we left town?
Q. Yes, left Arlington.
A. About 8:30.
Q. What time did you get there?
A. Got there about nine o'clock, or a little after.
Q. How large a crowd was there?
A. When we got there there were cars lined up on both sides of the road and a great number of people in the yard. And we counted the cars, along the road and those parked along both sides of the road and in the yard, and estimated about 250 cars
65 there.
Q. What was your idea of how many people were there?
A. There were at least 600 people there, I should think.
Q. What proportion of those people were of draft age, between 21 and 31?
A. I should think about half of them. There were not many old people out there, and there were not any young ones, and I imagine half of them were.
Q. Was not very many of your age there?
A. No.
Q. Did you see any of those people that you could name, young fellows who had registered, there at the meeting?
A. I did.
Q. Will you name them?
A. I saw John Bertrang there, and his brother, Herman, and Louis Kill, and William Wolters; my brother was registered.
Q. Was there any that you knew, young men, that had registered, besides those, that you knew by name?
A. There was a couple of Weckworth boys there.
Q. Don't know their first names?
A. No. I know they were Weckworths that I saw there.
Q. Did you notice any Haggenmiller boys there?
A. Yes, I met Haggenmiller.
Q. Did you state about what time it was that you arrived there? Have you stated that already?
A. A little after nine o'clock, or about nine; I don't know what time it was.
Q. Did you stay there until the defendant arrived?

A. We went back to the auto, and we heard some one calling the crowd up toward the house, that the speaker had arrived.

Q. Did you go up there then?

A. We went up.

66 Q. Who was the speaker?

A. Mr. Sugarman. And he was standing in the car when we got there.

Q. And you heard his speech?

A. Yes sir.

Q. You may go on and tell the court and the jury what he said.

A. When we got there he was reading a letter from, I think, the Secretary of War, forbidding soldiers to break up Socialist meetings. He talked on collective ownership and Socialism, and he said, kind of, well, bawled them out for not voting for Socialist congressmen, or not electing Socialist congressmen. And he said, "If you put Socialists in office you would not have the war." And he said that Wilson had made up his mind to have this war without consulting the people, and just said, "We will have war, and war was declared." He spoke of Wilson as a pal of Rockefeller and Morgan. And then he talked about different wars, Revolutionary war, Civil war; and he said they were all commercial wars. Spoke of George Washington as a great land-owner; Adams as a great tea merchant, I think he said. He said they were all commercial wars, that this war was just like the rest of them, that they were not—he said the Revolutionary war was not for independence, and he said that—he talked about the Civil war, about conscription; he said this was not the first time conscription was tried; he said "out in a little town near Augusta, Maine," he said, that "they would not be conscripted, refused to be conscripted, and they were not, and they seceded from the Union, and not a man was taken from that community"; and he said "now they are living apart from the United States, and glad that they are no part

67 of it, and glad that they are not in this war." And he said, in the course of his speech, he talked about Wilson thrusting us into war, and he says, "This is supposed to be a free country," he said, "Like hell it is"; and he said,—then further in the speech, why, I turned to him—I don't know—he said, now, that he "was not a walking encyclopedia or anything, but he thought he could answer most of the questions that could be put to him"; and someone asked him if the Socialists in general are registered. He said, "No. You have in St. Paul alone, there were 5,000 socialists that did not register," and he said that "if they stuck together, and the government did not take them"—my brother asked him why the government officials did not arrest them. He said they did not take them because they stuck together. Then I asked him what he would advise us to do if conscription officers came around,—he had said that conscription officers "would have a hell of a time," earlier in the speech,—he said "If a conscription officer came around, he would have a hell of a time that evening"—So I asked him what he would advise us to do if a conscription officer came around. He said, "A conscription officer what came around," he said, "you won't never be called on, and if you are and you don't answer," he said, "you will know what

will happen; anyway," he said, "you won't be shot in France. Does that answer your question?" I said, "No." "Well," he says, "if you all stick together, like the 5,000 Socialists in St. Paul, the chances are you will go on taking care of your farms and raising your hogs, nothing will happen to you." He said, "Does that answer you?" I didn't answer whether it did or not. He said "All Socialists
68 generally did not register." I asked him if he did register. He said he did, he was such a great value to the Socialist party, it was better for him to register. I think that is about all the speech I remember right now.

Q. Did he say anything about federal officers?

A. He said, "Now, for the benefit of any federal officer there in the crowd, I want you to understand I am not now advising these people one way or the other."

Q. That was at the close, after he said all these other things?

A. After he had said——

Q. That was at the close of the speech?

A. I would not say at the close of the speech, but it was after these questions were answered.

Q. Did you stay around after the meeting, when he stopped speaking publicly?

A. He said something about some different Socialists that had been—that were in prison, and that these cases would be carried to the higher courts, and that all these—this work had taken funds; there was a collection to be taken up, and all these—I noticed a lot of people contributing, and they sold Socialist literature—I didn't see any of it—I think it was.

Q. Did his audience make any manifestations?

A. Yes.

Q. During the speech?

A. Yes, they applauded and cheered,—applauded very much.

69 Cross-examination of Joseph P. McGovern.

By Mr. Schwartz:

Q. Mr. McGovern, isn't it a fact that Mr. Sugarman said that the constitutionality of the draft act would be tested in the higher courts?

A. He said that they had petitioned to take it to the, well, to the higher courts,—this petition to be sent to congress; and he said "it will be taken to the higher courts." I think he said that Louis Brandeis would—he was a fair, square fellow, and he would let nothing like that go on.

Q. The point is that he said the case would be taken, or some cases would be taken, to the higher court, to test the constitutionality of the act?

A. What I understood, would be to take to the higher courts, that these socialists who were imprisoned, that is what the collection was for, that is the way I understood,—this petition was to be sent to congress.

Q. As a matter of fact didn't Mr. Sugarman, in his speech, or right after the meeting, I don't know just when, say that the constitution-

ality of the act would be passed upon by the supreme court, entire supreme court?

A. Well, he—the way I interpreted what he said would be that this Mr. Brandeis——

Q. Can you state as near as possible what the words were in that connection?

A. He said "This will be taken to the supreme court, and Brandeis is chief justice," and he said he "was a fair, square fellow, and would not stand for anything like that." And it sounded peculiar
70 to me, because I had studied civics and different things, and I thought there would be more than one man.

Q. You knew that the Supreme Court was constituted of more than one man?

A. Yes, I did—associate justices.

Q. Mr. McGovern, you said something about a petition to congress. As a matter of fact wasn't there a petition circulated before Mr. Sugarman got there?

A. Yes.

Q. Or while he was there?

A. Yes, there was.

Q. Did you see that petition?

A. No, I didn't. I understood it was done; that they were to pass into this town hall, if they wanted to sign it, they could.

Q. It was a petition to congress?

A. To repeal this act sending the soldiers across the water,—the conscription act.

(Witness excused.)

Mr. Jacques: Government rests.

Mr. Stedman: Now comes the defendant, Abraham L. Sugarman, in person and by his attorneys, and moves the court to direct the jury to return a verdict of not guilty, and for reason thereof assigns as follows:

First, that the indictment does not state an offense; second, that the evidence is insufficient and not of sufficient weight or char-
71 acter to justify submitting the case to the jury; third, that the evidence does not sustain the alleged crime charged in the indictment.

The foregoing motion was argued to the court by counsel for the respective parties.

The Court: The motion is a rather broad one, and the argument has naturally taken a somewhat broad scope. The motion, I take it, in its present form, practically covers the same ground as the demurrer to quash the indictment, and also the more limited motion to direct a verdict for lack of evidence to go to the jury.

It is insisted by counsel for the defendant not only that the indictment does not state facts sufficient in law to constitute an offense, but also that under the evidence as disclosed on the part of the gov-

ernment a good indictment can not be drawn under Section 3 of the espionage law to cover the facts disclosed. These questions as to whether the indictment states facts in sufficient form, and whether the facts stated are sufficient in law, are somewhat intimately connected, and have been argued more or less together, so that they may be properly treated more or less together.

The indictment is drawn under section 3 of the socalled Espionage Law, Act of June 15, 1917, and, so far as this case is concerned, that section reads as follows:

"Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States shall be punished."

Now, the indictment drawn under that section is substantially as follows; that on the 24th of July, 1917, the United States being then and there at war, Abraham L. Sugarman, in the county of
72 Sibley, state and district of Minnesota, and within the jurisdiction of this court, did wilfully attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, by then and there urging, counseling and advising a number of young men (named) not to report when ordered so to do by the military authorities of the United States for military service, they, the said young men, being the persons who had theretofore registered for service in the military forces of the United States in accordance with the Act of Congress of May 18, 1917, and the rules and regulations promulgated by the President. Now, the ordinary tests for sufficiency of an indictment as to form are that it shall be sufficiently definite to acquaint the defendant with what charge he has to meet upon the trial, and also sufficiently definite and certain so that if he either is convicted or acquitted he may thereafter plead the judgment in any other prosecution that may be brought against him for the same offense, and, third, that the court may be acquainted with what is charged, so that it may determine whether or not the facts, if they are proven, constitute an offense in law within the statute under which the indictment is drawn.

Now, it seems to me, applying those tests to this indictment, that as to the formal requisites it is sufficient; it acquaints the defendant with the time and place of the offense; it acquaints him with the fact that it is claimed that then and there he attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States; and it acquaints him with how it is claimed that was done, by urging certain young men there not to report for military duty, and that these young men were men
73 who had been registered under the act of congress. It is true the indictment does not set forth what was said by the defendant in the way of urging, counseling and advising this disloyalty and refusal of duty, but it seems to me that, in the present instance, that would be requiring the indictment to set out evidence, and the indictment, as I understand it, is not required to set out evidence. It is required to set out ultimate facts, and it seems to me that within the tests this indictment does set out ultimate facts.

Now, whether the indictment sets out facts which if true are sufficient in law to constitute an offense, and whether the evidence that has been introduced here is sufficient to be submitted to a jury to determine whether the offense has been committed, are further questions that are raised by this motion. It is claimed that there is no allegation in the indictment of any intent on the part of the defendant, and it is true that there is no specific allegation of intent on the part of the defendant. It is alleged that he did "feloniously and wilfully attempt to cause insubordination, disloyalty," etc. Now, if the indictment had been for causing, and had alleged that he did certain acts, and then had alleged that he did those acts with intent to produce a certain effect, and that the effect was produced, that would have constituted one offense under this act. But this is the offense of attempting, which in its very nature assumes that the attempt was not consummated into the completion of the full crime. Now, an attempt, in its very nature, includes and involves intent.

So that, it seems to me, that when the indictment alleges
74 that there was an attempt to do a certain thing, it also, though not in so many words, stated that he intended to do that certain thing. So that, it seems to me, it was not necessary, in addition to the words used, that there should have been any allegation that in attempting to do a certain thing he was intending to do that certain thing, because the two, under the circumstances, are practically synonomous. Now, it is alleged in the indictment that he attempted to cause insubordination, disloyalty, and refusal of duty. That is in the words of the statute. The indictment goes further, and sets up specifically how that was attempted to be done, "by counseling and advising" certain young men not to report when ordered to do so by the military authorities,—in effect that they were to pay no attention to this duty under the law. Now, the allegations of the indictment, it seems to me, are sufficient in that respect, and the evidence that has been introduced here certainly tends to support the allegations of the indictment, and would on the face of the record as it now stands make a case for the jury.

There is a further question raised by this motion, and that is as to the status of these men in whom it is claimed this attempt was made to produce disloyalty and refusal of duty. The indictment alleges that these men had registered. It also alleges that an attempt was made to cause disloyalty and refusal of duty in the military forces of the United States. The evidence shows that the young men in question, named in the indictment, had registered. It also shows that they had received their serial numbers under the draft act. The indictment does not allege that to be the case, but the proof shows

it, and no point is made that the indictment does not state
75 that particular fact. And, of course, the date of making the drawing is an historical fact of which the court would take judicial notice without proof.

Now, the defendant claims that these men were not in actual military service, but the government contends that the men were in the military forces of the United States, and that is the most important question that is raised by this motion. I am sorry that I have not

had an opportunity myself to investigate more thoroughly this question. It is, I think, a very important question, and, so far as I know, hasn't yet been passed upon under the present law. The section itself reads:

"Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States shall be punished."

It doesn't use the language "in persons in the military service of the United States." And the question arises whether those two expressions are synonomous, whether the "military forces of the United States" may not be broader in scope than "persons in the actual military service of the United States." This word "forces" is used in a number of places in the statutes of the United States. It is also found in the Constitution of the United States. In section 8 of article 1 of the Constitution of the United States, enumerating the powers of Congress, amongst others, are these: "to raise and support armies; to provide a navy; to make rules for the governing and regulation of the land and naval forces." Now, whether the words "land and naval forces" there are exactly synonomous with the words "army and navy," is a question that might well bear close investiga-
76 tion. In chapter 187, volume 30, Statutes at Large, p. 361, which was the act providing for the raising of the army for the Spanish-American war, we find this language:

"Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled; that all able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

So far as I am advised, this section has not been repealed. Now, it seems to me there is a clear distinction between the expression "national forces," as used there, and persons in the actual military service of the United States. In the National Defense Act, which was passed in June, 1916, we find this language, in section 111:

"When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the regular army, the President may, under such regulations, including such physical examination as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war, unless sooner discharged, any and all members of the national guard and of the national guard reserve."

There, again, a distinction is made between the forces of the United States and persons in the actual military service of the United States. Now, as I say, I have not had an opportunity to investigate this question carefully; but I have concluded, from reading these laws, and from considering the purpose of the laws, that the military forces of the United States are, at any particular time, what Congress declares them to be. By the Act of April 22, 1898, (30 St., p. 361,) the national forces were declared to be male persons, citizens,
77 and certain others, between the ages of eighteen and forty-five. By the Act of May 18, 1917, the selective draft act, Congress designated a class of persons between the ages of twenty-one and thirty-one from whom should be drawn an army for active military service. Now, registration was the first step in the organizing of the army, the first step in bringing this class of men, or certain members of it, into active military service, and the drawing of the numbers at Washington, on July 20th, was a second step, and other steps, of course, would be those taken by the local boards and the district boards, until finally a man would either be excused or rejected, or become a member of the army in active military service. Considering, therefore, the broad purposes of this act, of May 18, 1917, considering the evils that were intended to be met by section 3 thereof, considering the language of the section, I am of opinion that the words "military forces" therein should be given a broad, rather than a narrow, meaning, and should be held to mean not merely the men that are in active military service, but also men who had registered and had received their serial numbers from Washington; and that is as far as is necessary to hold in this particular case. Now, if that construction is the proper one, then the indictment in that respect is sufficient, inasmuch as these men named in the indictment were within the class of persons constituting "the military forces of the United States" at the time and place in question. And the evidence supports the allegation of the indictment that these men named had in fact registered, and also shows, that they had in fact received their serial numbers.
78 It seems to me, therefore, under the circumstances, that the indictment is sufficient, and that the evidence is of such character and amount as requires the submission of the case to the jury; therefore the motion for a directed verdict will be denied.

Mr. Stedman: Exception.

Testimony on Behalf of Defendant.

ABRAHAM L. SUGARMAN, being first duly sworn, testified as follows in his own behalf:

Examination-in-chief.

By Mr. Stedman:

Q. What is your name?
A. Abraham L. Sugarman.
Q. Where do you live?

A. Minneapolis.
Q. How old are you?
A. Be twenty-three in a few days.
Q. You are twenty-two now?
A. Yes sir.
Q. And a married man?
A. No sir.
Q. What is that?
A. No sir.
Q. Have you registered?
A. Yes sir.
Q. You were present at Kelso and delivered an address there, I believe?

A. Yes.

79 Q. Referring to the number of persons, in that portion of your address, the number of persons who had failed to register, or registered, in St. Paul, give as nearly as you can what was said.

A. As I remember it, I said that I had heard there were about 5,000 people in St. Paul that did not register. However, I may have been talking hurriedly and said 5,000 socialists, by mistake, instead of saying 5,000 people; and I can't state positively what I said. But I know what I meant to say.
Q. There are not that many socialists there?
A. No, the party membership in St. Paul is between four and five hundred.
Q. That includes people of all ages?
A. Yes, including women.
Q. I want to ask you if that day a man named Beseke, or any other person, came to you and asked you the question, "What would you advise I should do if I am called upon to report"? And did you answer, "You should not report"?
A. Never made such an answer.
Q. Was there any question of that kind asked of you or answered by you, after the meeting?
A. Yes, someone in the audience asked me that.
Q. This was an open, public question?
A. Yes sir.
Q. After you had gotten off from the automobile did anyone ask you that question?
A. No, no one asked me that question.
Q. Did a man there—Do you recall a man, Beseke,—did Beseke ask you that question after you got off?
A. No.
Q. Was that question asked of you while you were in the automobile speaking?
A. Yes, it was.
Q. Will you state what the question was, and your answer.

A. The question, as I remember it, was, "What would you
80 advise people to do, if he were called to report for physical examination?" And I replied to that question, "Well, you will have to go."

Q. Was that followed with another question?

A. Yes. Shortly after that someone else, or may have been the same man, asked the question, "Well, suppose they don't go?" And I replied, "I suppose, in that case, they will come and get you." And there was a question after that, to the effect, What would happen if the whole crowd would not go, or if they came out and tried to arrest the whole crowd? And I said, "Well, I imagine they would have a hell of a time doing it"—alluding to the large size of the assembly.

Q. How large an assembly was it?

A. I should say about six or eight hundred people.

Q. Do you know who arranged this meeting?—at least you didn't arrange it? Did you arrange it?

A. No, sir.

Q. You were called out there to speak?

A. Yes, I was called by telegram.

Q. Were there petitions there?

A. Yes, I know that there were.

Q. Petitions for what?

A. There were two petitions, one was a petition to congress urging that body to repeal the conscription act; and another one that I brought along myself, a petition asking congress to submit the conscription act to a vote of the people.

Q. Did you at that meeting, or at any other time, urge, counsel and advise any number of young men to refuse to obey any rule, order, military law, or fail to respond to the call?

A. No, sir, I did not.

Q. I want to ask you, Did you ever attempt or intend to urge, counsel, advise, any men within the military service of the
81 United States, or otherwise, not to obey the law, military law?—Did you at any time attempt or intend to urge, counsel and advise any men to be, or cause them to be, insubordinate, disloyal, to commit an act of mutiny, or refusal of military duty?

Mr. Jacques: Objected to as leading.

The Court: The first part, whether he had any intent, I think, may be asked. I think the question involves both the intent and whether he attempted to. He may state whether he had any such intention.

Q. Leave out the word "attempt," use the word "intent."

The Witness: I don't understand the question.

Q. Did you intend to counsel, aid, advise, any persons, or did you attempt to advise, aid, or counsel any persons, or to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States?

A. No, I did not; not at that meeting, or at any other time.

Q. You arrived at that meeting about what time?

A. About a quarter to eleven, I think it was.

Q. How long did you stay there?

A. I think it was about an hour.

Q. Shortly prior to that time were you nervous, suffering any from injury to your hand?

A. Yes, I had been with a physician that afternoon.

Q. What was the trouble with your hand?

Mr. Jacques: Objected to as incompetent, irrelevant and immaterial.

The Court: I don't suppose that is connected in any way with this case.

82 Mr. Stedman: If it is not the subject of comment afterwards. I don't want to have any misunderstanding as to the reason.

Q. That condition of your hand preceded the draft law?

A. Oh, yes.

Q. With reference to the statement, if it was made, in regard to all sticking together there, will you state what was said in reference to that by you?

A. Why, yes. I urged the farmers that were in that audience to organize. I have been doing that for a long time; not, however, in reference to the draft law, or the present war; I was there for the purpose of organizing a socialist local, and I took applications for membership in that local at the conclusion of the meeting.

Q. Did you tell them, if they all stood together that they would not have to obey this draft law?

A. Oh, no, never told them that.

(Witness excused.)

83 EVALD W. ZACHARIAS, recalled to testify on behalf of the defendant.

Examination-in-chief.

By Mr. Stedman:

Q. What is your full name?

A. Emial W. Zacharias.

Q. You have been called heretofore as a witness for the government, have you not?

A. Yes, sir.

Q. What time did you arrive at the meeting addressed by Mr. Sugarman?

A. Well, I could not exactly tell, must have been about half past ten o'clock.

Q. Was it about the end of the address?

A. Yes.

Q. Were you there after the meeting, after he had finished talking?

A. Why, yes, I was there when he ended the meeting.

Q. You remained until after the people left and until he went away from that place?

A. No, I did not.

Q. Did you hear anyone ask him the following question, and his answer; did you hear anyone ask him, "What would you advise me to do if I am called upon to report?" And did you hear Mr. Sugarman say, "You should not register?"

A. I didn't hear that question.

Q. Were you close enough so you could hear it, if it had been said?

A. Yes, I think I was.

Q. That is, assuming it was not whispered. He spoke out loud, ordinary tone of voice, if he spoke that way, you could have heard it, could you?

A. Yes.

Q. Did you hear him ask any question in regard to the
84 question of reporting?

A. Why, I heard the word from Mr. Sugarman, that he said, "If they call you for physical examination, if they call you, you go."

Cross-examination of Evald W. Zacharias.

By Mr. Jacques:

Q. How long were you at the meeting?

A. I think I was there about twenty or twenty-five minutes.

Q. You heard the finish of this speech?

A. Yes.

Q. And you were there afterwards?

A. No, I left the room then.

Q. Just as soon as the meeting was over?

A. Yes.

Q. All the time you were there were you listening, paying attention to the speech?

A. Why, I could not remember; I was interrupted by so many friends, asking me questions about when the examination would be called, for physical examination.

Q. You didn't hear much of the speech?

A. I did not.

Q. He might have answered the question the way it has been suggested that he did, and you not hear it?

A. He might, yes.

Q. Did you know what the purpose of that meeting was?

A. No.

Q. There were a large number of men who had registered, in the crowd, wasn't there?

A. Why, I figure about forty or fifty men.

Q. Forty or fifty men, you would think?

A. Yes.

85 Q. How large was the crowd?

A. Must have been about eight hundred.

Q. And your estimate would be that forty or fifty of them were within the ages of twenty-one to thirty-one?

A. Yes sir.

Q. The rest were older?
A. Older people.
Q. How did you come to go to the meeting?
A. I was called. I was not home. When I got home it was after nine o'clock. When I got home they said there was a call for me. I went down to the central office, and they said the call was from Arlington, to go out and arrest men in the township of Kelso.
Q. About what time did you get there?
A. That must have been past ten. I may be left past ten. It was past nine when I got home,—before I got the car out, and found my chauffeur.
Q. Do you remember that night that Dr. Bouche called you?
A. Yes sir.
Q. You talked to him, did you?
A. That was past nine, yes, when I was down to the central office.
Q. That was the first time he called you?
A. I don't know. There was a call before; I was not home.
Q. You are the sheriff of Sibley County?
A. Yes.

(The witness is excused.)

86 ERNIE H. LIESKE, being first duly sworn, testified as follows, on behalf of the defendant.

Examination-in-chief.

By Mr. Stedman:

Q. Where do you live, Mr. Lieske?
A. Henderson.
Q. Were you in Kelso on July 24th?
A. Yes sir, I was.
Q. I want to ask you, after the meeting was over, and Mr. Sugarman left his automobile and walked down, were you near him then?
A. Yes sir, I was.
Q. How close were you to him?
A. I was right beside him.
Q. Where did he go to from there?
A. Walked to the town hall.
Q. Do you know Mr. Beseke?
A. No, I don't.
Q. Did you hear any man there, in automobile or in a group, ask Mr. Sugarman, "What would you advise me to do if I should be called upon to report?" And did Mr. Sugarman answer, "You should not report?"
A. No.
Q. Or anything of that kind?
A. I know nothing of that kind.
Q. After he left the automobile and was walking along did you hear any questions asked him?
A. Nothing while I was with him.

Q. And you were standing by his side?
A. I was walking beside him.

87 Cross-examination of Ernie H. Lieske.

By Mr. Jacques:

Q. That question might have been asked? You didn't hear everything that was said?
A. I heard everything after he left the automobile.
Q. They got into a little group around the automobile?
A. No, they walked from the automobile to the town hall.
Q. After Mr. Sugarman stopped speaking, wasn't there a crowd circled around the automobile—a circle of people around the automobile, or around Mr. Sugarman, before they went over to the town hall?
A. After his speech was over, they just took up a collection, and I——
Q. Was any people around him while they were taking the collection, talking to him?
A. That collection was taken while he was making the speech.
Q. While he was still speaking?
A. Yes sir.
Q. Wasn't there a group of people surrounded him after he was through the speech, and the collection was taken, talking to him casually, and surrounding the speaker, as the way they do?
A. No.
Q. You were not at the automobile there for a couple of minutes when his friends were around him?
A. He was not talking to anybody, at least around the automobile.
Q. Nobody asked him any question?
A. No sir.
Q. Nobody talked to him?
A. No sir.
Q. Everybody avoided him?
A. Yes sir.

88 Q. At least you didn't hear Beseke, or anybody else, asking him about this draft business?
A. No.
Q. How old are you?
A. 23—22.
Q. Are you registered?
A. Yes sir.

(Witness excused.)

FRED A. LIESKE, being first duly sworn, testified as follows, on behalf of the defendant.

Examination-in-chief.

By Mr. Stedman:

Q. Where do you live, Mr. Lieske?
A. At Henderson.
Q. What is that?
A. At Henderson.
Q. Are you acquainted with Mr. Sugarman?
A. Well, I have seen him at the meeting.
Q. That was July 24th?
A. Yes sir.
Q. Were you there throughout the meeting?
A. Yes, I was.
Q. And were you there after he quit speaking?
A. Yes, I was.
Q. When he got off from the automobile, where did he go?
A. When he got off the automobile, I went into the house, because I took up the collection.
Q. Right after he got off the automobile, were you with him, do you know?
A. I was there until he went off and went over to the town hall, and I went into the house with Mr. Siemen.
89 Q. While the meeting was going on did you hear him advise or tell anyone not to report?
A. I did not.
Q. When called upon?
A. I did not.
Q. Do you know that he did not tell anyone not to report?
A. No.
Q. You mean that he did not tell?
A. He did not tell anybody not to report.

Cross-examination of Fred A. Lieske.

By Mr. Jacques:

Q. Just those words,—he didn't tell anybody not to report, just those words?
A. No, I never heard him, that he told anybody not to report.
Q. In just that language?
A. No. But I didn't hear that, that he said.
Q. How far is Henderson from this place, Kelso Township?
A. About, I should judge, about seven miles.
Q. How old are you?
A. I am thirty-seven.
Q. Did you take any active part in organizing this meeting?
A. I did.
Q. Have any bills out of the meeting?

A. No, did not.
Q. How were this crowd of people notified to come there?
A. We was out the day they was going to organize a meeting.
Q. Out one day?
A. One day only.
Q. Saw the people?
A. Yes. We was out to Glencoe.
90 Q. Are you a socialist?
A. No, I am not.
Q. This was purported to be a socialist meeting?
A. Yes.
Q. Why, then, were you interested in it?
A. Because we wanted to have a speaker.
Q. Wanted to have a speaker?
A. Yes.
Q. To talk socialism?
A. Well,——
Q. To people that were not socialists?
A. Not only that, but we thought that the socialists were just as good people as anybody else.
Q. That is all those well-to-do farmers around there do——

Mr. Schwartz: Objected to.

Q. What were the objects of that meeting?
A. To petition the president and congress.
Q. To what effect?
A. Not to send our boys across the ocean.
Q. Did you get Sugarman to come to that meeting?
A. I and my brother did.
Q. Telegraph him?
A. We telephoned to the socialist party for a speaker.
Q. Didn't telephone Mr. Sugarman. Did you notify all these people around there there was going to be a socialist meeting?
A. We told them there was going to be a meeting.
Q. Did you tell them it was a socialist meeting?
A. No, just told them there was going to be a meeting and we were going to have a speaker there.

(Witness excused.)

91 Mr. Stedman: That is all.
The Court: Defendant rests?
Mr. Stedman: We rest.
Mr. Jacques: Government rests.

Testimony closed.

The case was thereupon argued to the jury. The argument of counsel to the jury not having been completed at the hour of adjourning, the same is to be resumed upon the convening of the court.

Court adjourned to ten o'clock a. m., October 26th, 1917.

Proceedings of October 26th, 1917.

Morning Session.

The argument of the case to the jury was resumed.

Mr. Stedman: I want to except to the remark (counsel referring to certain statements made by counsel for the government during the course of his argument of the case to the jury), that the socialist committee had decided to instruct people not to register.

Mr. Jacques: I said that was the inference, from what they did there, from the fact that they decided that this young man should register the negative should be implied from the circumstance—purely inference.

92 Mr. Stedman (during the argument of counsel for the government to the jury): Want to object to this statement; there is no evidence that they didn't go as willingly as persons who may agree with you, in every theory. I think the records of this country will show it, too.

Mr. Jacques: I don't know; we have had a good many of them.

Mr. Stedman: I object to the statement of fact, purported statement of fact, which the evidence does not show.

The Court: The jury will bear in mind that in deciding this case they are to consider the evidence in this case only.

Mr. Jacques: I didn't mean to state that as the fact; I didn't state—merely an illustration, an argument, that is all.

Upon the conclusion of the arguments to the jury, the court charged the jury as follows:—

(*Charge of the Court.*)

GENTLEMEN OF THE JURY: The defendant in this case, Abraham L. Sugarman, is charged with having committed an offense against the United States, towit; attempting to cause insurbordination, disloyalty, mutiny and refusal of duty in the military forces of the United States, the United States then being at war. The in-

93 dictment charges substantially as follows; that on the 24th day of July, 1917, the defendant Abraham L. Sugarman, in the county of Sibley and state of Minnesota, within the jurisdiction of this court, did wilfully attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States, by then and there urging, counseling and advising a number of young men, towit: Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Von der Brelje, Edward Weckworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Robt. Mesker, and Raymond Mesker, and many others, whose names are to the grand jury unknown, not to report when ordered so to do by the military authorities of the United States for military service; that they, the said young men named and others, being persons who had theretofore

registered for service in the military forces of the United States in accordance with the Act of Congress of May 18, 1917, and the rules and regulations promulgated in reference thereto. The statute of the United States which it is claimed has been violated by the defendant is the Act of June 15, 1917, known sometimes as the Espionage Act, and especially section 3 of that act, and section 3 of that act, so far as it applies to this case, reads as follows: "Whoever when the United States is at war shall wilfully cause or attempt to cause insurbordination, disloyalty, mutiny, or refusal of duty in the military or navel forces of the United States shall be punished." To this indictment, gentlemen, the defendant has pleaded not guilty, and this indictment and the plea of not guilty make up the issues of fact in the case which you are to decide in arriving at your verdict. The indictment
94 is the result of an investigation by the grand jury and the officers of the law. But this investigation is in no sense to be taken as a trial; it simply constitutes the regular method of bringing the matter before the court and a jury for a trial. The indictment itself is no evidence of the guilt of the defendant, nor does it detract from the presumption of innocence which surrounds the defendant in the course of this trial. The charge that is contained in this indictment the government must establish by proof, in order to show the defendant guilty. Now, in this, as in all criminal cases, the defendant is presumed to be innocent until his guilt is proven by competent evidence produced against him, and this presumption of innocence remains with him throughout the trial, and applies to the consideration of each of the elements going to make up the crime charged. The burden devolves upon the government that presents this charge of meeting this presumption of innocence and overcoming it by proof, and the degree of proof which the law establishes as the standard by which the defendant shall be tried is that his guilt must be shown beyond a reasonable doubt. The defendant, therefore, can not be convicted of the offense charged in this indictment, unless and until each of the essential ingredients of the crime have been established by evidence that satisfies the minds of the jurors beyond a reasonable doubt. Now, "reasonable doubt" is a doubt based upon reason, and which is reasonable in view of all the evidence. And if after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that
95 you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. Reasonable doubt is not a mere whimsical or fanciful or captious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt. Absolute or mathematical certainty is not required; but there must be such certainty as satisfies your reason and your judgment, and such that you feel conscientiously bound to act upon it.

There are several matters that arise in this case for your consideration. First, whether the United States was at war at the time of the

alleged offense; second, whether the parties in whom it is alleged the attempt was made to produce disloyalty and refusal of duty, or some of them, were in the military forces of the United States; third, whether the alleged attempt to produce disloyalty and refusal of duty was in fact made by this defendant. Now, as to the first matter—whether the United States was at war at the time in question, you will have no difficulty. That the United States was at war on July 24, 1917, the date of the alleged offense, is a fact of which the court will take judicial notice, and about which there can be no dispute; and the court instructs you that the United States was at war on the date in question. As to the second matter, whether the parties in whom it is alleged attempt was made to produce disloyalty and refusal of duty were in the military forces of the United States; it appears by the uncontradicted evidence and is admitted that the parties named in the indictment, these young men who are alleged
to have been present at the time and place in question, had
96 registered in accordance with the Act of Congress of May 18,
1917; also that they had been given their numbers at the drawing which took place in Washington on or about July 20, 1917. And the court instructs you as a matter of law that under the evidence and the law these men that are mentioned in this indictment as having been present at this meeting, were in the military forces of the United States, within the meaning of that term as used in section 3 of the Act of June 15, 1917. The third matter is the one about which there is the main dispute, and about which most of the evidence has been introduced, namely: whether the attempt charged was in fact made by the defendant. Now, the government claims that this offense was committed on July 24, 1917, at Kelso, Minnesota. At that time the United States was at war. At that time the Conscription Act, socalled, had been passed—the act of May 18, 1917. At that time the registration under that act had taken place, on June 5, 1917. At that time this law known as the espionage law had been passed, on June 15, 1917; and at that time the drawings of the men who had registered had taken place at Washington, on or about July 20, 1917. Now, the government in support of its charges has introduced testimony tending to show that on this date, July 24, 1917, at Kelso, Minnesota, the defendant, at a public meeting, at which meeting these young men named in the indictment were present, in the course of his public remarks, made use of language substantially as follows: that he "did not believe in this war; that the government had no right to send the boys to France; that the law"—referring to the Conscription Act—"was unconstitutional, and that there was no obligation to abide by it, and that it would be
declared unconstitutional by the courts; that in other wars
97 there had been conscription; that in the civil war there had
been a small community in Maine that had refused to be drafted, and the authorities had left them alone, and they did not have to go; that there were five thousand Socialists in St. Paul who did not register, that the government did not molest them, except now and then one; that the government could not arrest all, because there would not be room enough for them in the jails; that if all the

young men who had registered refused to go, and would stick together, there would be nothing to it—that the officers could not arrest all of them, because there was not room enough in jail; that if the conscription officers tried to arrest the company then present, they would have a hell of a time;" and that, in answer to a question by a man who had registered and was present at the meeting, as to what he would do if he was called upon by the Board, under the Conscription Act, he told him not to report. Now, the defendant denies that he counseled or advised at this meeting disloyalty or refusal of duty or insubordination or mutiny in any manner whatsoever, and he denies that he had any intent to cause disloyalty or mutiny or insubordination or refusal of duty, and he denies that he made any attempt to cause the same. The defendant denies specifically that in answer to a question by a man as to what he should do if called upon to report he told him not to report; but the defendant testified that he did tell a man who asked some similar question, "You will have to go;" that the man said, "Suppose I don't go?" that the defendant replied, "Well, they will come and get you;" that the man said, "Suppose they come to arrest all of us?" that the defendant then said, "They will have a hell of a time." The defendant
98 also denies specifically that he said, "If men would stand together they would not have to go;" but the defendant testified that he advised them to "stand together," when talking to the men present, and advising them to become members of the Socialistic party. Several witnesses for the defendant have testified that they did not hear the defendant tell the man who asked for advice not to report; and one witness testified that the defendant told one man who inquired that "if called, you go." Now, gentlemen, perhaps I have not given the exact words that were used by the witnesses on the stand. But if I have not, and you recollect the testimony differently, you will use your own recollection of what the words were used by the witnesses on the stand, instead of the words that I have used in endeavoring to bring it back to your attention. It is for you to determine from the evidence whether the words claimed by the government to have been uttered by the defendant at this time and place, or some of them, or substantially these words, were in fact uttered by the defendant at the time and place in question. If you fail to find that the words charged by the government, or some of them, or substantially those words, were uttered by the defendant, at the time and place in question, then the defendant can not be convicted in this case, and your verdict should be for acquittal. But if after a full and fair consideration of the evidence you are satisfied beyond a reasonable doubt that the defendant did utter the words claimed by the government, or substantially those words, or some of them, then you will consider whether the defendant intended, by the use of the words, to produce insubordination, disloyalty, or refusal of duty in the military forces of the United States, that is, in the men
99 present who had registered under the Conscription Act. The offense charged here being an attempt, the element of intent enters into it, and the question for you here to consider and determine is, Whether the defendant, at the time and place in question,

had the intent to produce in the military forces of the United States, that is, in the young men present who had registered, disloyalty, insubordination or refusal of duty. The defendant has testified that he had no such intent. That testimony should be considered by you fairly and fully. There is no direct testimony to the contrary. But it is seldom possible, gentlemen, to prove by direct evidence what intent on a given subject existed in the mind of a person at a given time, and it is not necessary to prove the fact of intent by direct evidence. You can generally only determine what is in a person's mind by external manifestations, and in determining the question of intent, the jury have a right to take into consideration not only the direct evidence bearing thereon, but all the facts and circumstances surrounding the defendant in a given transaction, so far as they may be disclosed by the evidence, including, in this case, the words that the evidence shows were in fact actually used by the defendant. And if from the consideration of all the evidence, including such facts and circumstances, the jury is satisfied beyond a reasonable doubt that the intent charged did exist in the mind of the defendant, they should so find; otherwise not. The words of the statute, "insubordination, disloyalty, mutiny, or refusal of duty," may, perhaps, need a word of explanation. "In-subordination" means failure on the part of persons in the military or naval forces of the United States to abide by and conform themselves to
100 the rules, the laws, and the regulations of the miiitary and naval forces of the United States. "Disloyalty" means unlawful conduct, that is, violation of the laws, the rules and the regulations relating to the military or naval forces of the United States, or the carrying on of the war. I think it is hardly necessary to define "mutiny," because I think the evidence does not show any substantial ground on which a finding in regard to mutiny could be established. "Refusal of duty" is another expression found in this law, and that means refusal to comply with the rules and the laws and the regulations relating to the United States military and naval forces, or relating to the organization of the army or navy, or relating to the carrying on of the war. Now, no particular form of expression, no particular words, are necessary in order to constitute an offense under this statute; but you are to determine in this case, first, what the words were that were in fact uttered by this defendant at the time and place in question; and then whether the defendant, in making use of those words, had the intent to produce disloyalty or insubordination or refusal of duty in the persons then present who were part of the military forces of the United States. You are to consider the evidence and the whole of it, in determining whether this offense has been committed by the defendant.

Now, considerable has been said in this case about Socialism and Socialists, and the testimony has shown that the defendant is a Socialist. That fact, however, is not of material importance in this case. A man has a right to belong to the Socialist party the same as he has a right to belong to other political parties, and to
101 advocate the principles of that party. And that the defendant belongs to a particular political party is in itself immaterial

in this case. This fact in itself can neither convict the defendant nor acquit the defendant in this case. But, whatsoever party a man may belong to, he is bound to obey the law, and socialists and republicans and democrats and prohibitionists were bound not to violate the provisions of this espionage law of June 15, 1917, and especially section 3, under which this defendant is indicted. And no man, under the guise of advocating the principles of his political party may with impunity attempt to cause insubordination, mutiny, disloyalty, or refusal of duty in the military forces of the United States. Whether this defendant, Sugarman, in this case did make such an attempt, is for you alone to decide, upon a full and fair consideration of all the evidence in the case bearing upon that question.

Now, considerable has also been said in this case about freedom of speech. The Constitution of the United States provides that congress shall make no law abridging the freedom of speech. This provision of the Constitution is of course in force in times of war as well as in times of peace. But "freedom of speech" does not mean that a man may say whatever he pleases without the possibility of being called to account for it. A man has a right to honestly discuss a measure or a law, and to honestly criticize it. But no man may advise another to disobey the law, or to obstruct its execution, without making himself liable to be called to account therefor.

Now, gentlemen, it is exclusively your duty to determine
102 the facts upon the issues that are submitted to you. You are not to take any comments that the court has made throughout the trial, or any rulings that the court has made, as indicating any view that the court has, or that you are expected to adopt. Nor are you bound by the statements of counsel on either side in the course of the trial or in the argument, as to what has been proven or disproven. It is your duty to consider the evidence and the whole of it, and determine the facts for yourselves. The rulings of the court have been made for the purpose of bringing before you all of the evidence that has been offered which has been considered competent, relevant and material, and excluding all else. The arguments of counsel have been made for the purpose of explaining, analyzing, emphasizing, that evidence, and drawing legitimate conclusions therefrom. But it is your duty to take the evidence, and the whole of it, and to examine it fairly and fully, and determine therefrom the facts for yourselves. Under your oaths you must reach a verdict based solely upon the evidence and circumstances in evidence and the law given you in this case.

You are likewise the sole and exclusive judges of the credibility of all of the witnesses, and it is for you to say who should be believed and to what extent. In judging these questions you may, among other tests, observe the demeanor of the witnesses upon the stand, their manner of testifying, whether direct or evasive, or shifting, their candor or lack of candor, and the reasonableness or unreasonableness of their story, when viewed in the light of facts in the case which are admitted or proven by uncontradicted testimony, and when viewed, also, in the light of your own judgment as men

103 of experience and affairs. You may also consider any interest that a witness has or appears to have in the outcome of the action.

Now, gentlemen, I have called your attention to these various rules of law which govern this controversy. You will understand that I have not undertaken to review the testimony or any considerable portion of it, nor called to your attention all the facts and circumstances which go to throw light upon the questions that you will have to consider. Counsel for the government and counsel for the defendant have gone over this evidence carefully, fairly and fully, and I feel sure that when you retire to your jury room you will be able to refresh each other's recollection on the testimony. You should consider the evidence, and the whole of it, carefully, fairly and fully, giving to such evidence whatever weight and credit it is entitled to in your judgment, reconciling it, so far as you can, and where it can not be reconciled, it is your duty to sift out the true from the false. If after a full and fair consideration the evidence does not satisfy you beyond a reasonable doubt that the defendant committed the offense charged in this indictment, then you will find a verdict that the defendant is not guilty. If, on the other hand, after such consideration, you are satisfied from the evidence, and beyond a reasonable doubt, that the defendant did commit the offense charged in this indictment, then it is your duty to so find, and in that event you will find the defendant guilty.

Now, gentlemen, this is an important case; important to the defendant, because he stands here charged with a serious offense
104 against the United States. If the evidence fails to convince you beyond a reasonable doubt that he is guilty, he is entitled to a verdict of acquittal at your hands. On the other hand, the case is important to the government. The United States is at war; it is organizing great military forces; it demands that those forces and each member thereof shall give obedience, loyalty, strict performance of duty to the government; and the government can not tolerate for a moment any attempt by anyone, at any time, at any place, to cause disloyalty, insubordination, or refusal of duty. All such attempts must be investigated by the government, and, if the investigation justifies it, the parties charged must be brought to trial, as this defendant has been brought to trial here; and it is for you to determine, in this particular case, upon all the evidence in the case, whether the defendant is guilty or is not guilty.

Now, gentlemen, you will be given two forms of verdict; one form in case you find the defendant guilty, one for use in case you find him not guilty. When you retire you will select a foreman. When you have agreed upon a verdict your foreman will sign it, and you will then report with it to the court.

Mr. Stedman: Except to that portion of the charge wherein the court said that if the government proves some of the words that have been shown in evidence.

I make that, because, under the instruction, proof of a man's name would be sufficient.

Exception allowed.

Mr. Stedman: Also to that portion of the charge wherein the court states that a man has a right to honestly criticize. The
105 question of integrity of law is not involved.

Exception allowed.

Mr. Stedman: I except specifically to that portion of the charge in regard to investigation by the grand jury, and that that is not evidence, and the court should not have instructed in that manner which would leave that as a proper inference from the instruction of the court.

The Court (addressing the jury): I instructed you, specifically, that the indictment was the result of an investigation of the grand jury, and was not evidence, and should not be so considered, and did not detract in any way from the presumption of innocence.

As to the use of the words,—in reference to the words that were claimed to have been used, in which I charged you that the government must prove the words, or some of them; I intended by the expression "some of them," some of the language which was claimed by the government was uttered to produce and cause disloyalty and refusal of duty. You, as men of common sense, will understand that by the use of that expression "some of the words," it would not mean simply use of a man's name, or something that had no connection whatever with the producing or causing of the disloyalty, or the insubordination, or refusal of duty, which is charged here.

106 Exception allowed.

Thereupon counsel for defendant renewed the requests that the following charges be given:

1. Gentlemen of the Jury, although the arguments of counsel may have assumed a range covering several subjects, the real issue to be decided by you is strictly within the narrow compass defined by the indictment presented in this case and put in issue by the plea of not guilty entered by the defendant, and in this connection you are instructed that the indictment is no evidence against the defendant, it is only a formal statement of the charge preferred against him for the purpose of enabling him to know and to meet the offense alleged against him, which said request is refused because covered.

Exception allowed the defendant.

2. The indictment in this case charges that the defendant wilfully caused or attempted to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or wilfully did obstruct the recruiting or enlistment service of the United States to the injury of the United States. The defendant by entering a plea of not guilty denies this charge and it thereupon becomes necessary for the government to prove the charge as laid in

the indictment beyond a reasonable doubt; which said request is refused because covered.

Exception allowed the defendant.

3. A reasonable doubt is such a doubt as would cause a reasonable and prudent man to pause and hesitate in the graver affairs and transactions of life. It must be a doubt based upon
107 reason. It is not sufficient to justify an acquittal that it should be a vague or captious doubt and it is improper for you to search for a doubt. The reasonable doubt contemplated by law must arise from the evidence. That is, after you have considered all the evidence and circumstances admitted in evidence in the case and the law applicable thereto, if you have an abiding, that is, a continuing conviction that the defendant is guilty, then you have not a reasonable doubt and should find the defendant guilty. If, however, after considering all the evidence and circumstances in evidence in the case and the law given you by the court you are uncertain and, a reasonable doubt arises in your mind as to the truth of the charge alleged in the indictment, then it is your duty to find the defendant not guilty; which said request is refused, in the form requested.

Exception allowed the defendant.

4. The law presumes the defendant to be innocent and this presumption is evidence created by law and it is your duty to start the consideration of this case presuming the defendant innocent and that presumption continues throughout the trial and during your deliberations as jurors, and it is your duty to oppose the evidence of guilt with the presumption of innocence, and in considering the instructions by the court this presumption prevails. If the evidence should be evenly balanced upon any material fact in the case, or you are in doubt as to the meaning of the law given you by the court, then the presumption of innocence created by law is such as to make it your imperative duty to determine such fact or circumstance in favor of the defendant; which said request is refused for the
108 reason that it is covered in the charge.

Exception allowed the defendant.

5. Neither Socialism, the Socialist party or any member of the Socialist party as such is here on trial. Whether you approve or disapprove the doctrines and teachings of Socialism, the practice and program of the Socialist party and its members is wholly immaterial. Every person has a perfect right to affiliate with and belong to any political party or other legitimate organization of his own opinion, and can not be denied that right. Every person has a right in all lawful ways and by all lawful means within his power to work for and assist the party or organization to which he may belong. Of course, this does not warrant a person under the guise or pretense of aiding or assisting any organization to commit crime or to violate the law or to procure or induce others to violate the law and here I wish to impress upon you that nothing in this charge is intended to convey to your minds that the court believes the defendant has violated any law or that he has not violated any law.

The court has no opinion, that is your province exclusively; which said request, in the form requested, is refused.

Exception allowed the defendant.

6. Every citizen of the United States has a legal right to have and to express an opinion against the approval of any proposed or pending legislation and to have and also to express an opinion in opposition to proposed legislation after it has become a law and also to favor the repeal or modification of any law after it has been approved or adopted; which said request is refused in the form
109 requested.

Exception allowed the defendant.

7. Every citizen has a right to have and express an opinion which is opposed to Conscription either before or after the enactment of the Selective Draft Act or Conscription Act approved on the 18th day of last May; which said request is refused.

Exception allowed the defendant.

8. The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, or of the press or the right of the people peaceably to assemble and to petition for a redress of grievances. This right has been deemed so essential and necessary to free institutions and a free people that it has been incorporated in substance in the constitutions of all the states of the Union. These constitutional provisions referred to are not abrogated, they are not less in force now because of war, and they are as vital during war as during times of peace, and as binding upon you now as though we were at peace; which said request, in the form requested, is refused.

Exception allowed the defendant.

9. This provision of our constitution will not justify or warrant advocating a violation of law. A man may freely speak and write and petition but he is responsible for the consequences of what he may say, write or publish, and if what he says and publishes has a natural tendency to produce a violation of law, that is to impel the persons addressed to violate the law, and the person using the language intends that it should produce a violation of law, then
110 the person using such language is subject to punishment and this is not inconsistent with the right and protection guaranteed by the Constitution of the United States and of this state; which said request is refused because covered in the charge.

Exception allowed the defendant.

10. You have a right to presume that the defendant intended the natural consequences of the language used by him; which said request is refused, because covered in the charge.

Exception allowed the defendant.

11. If you are satisfied that the language used by the defendant was intended to and was violating law, as charged in the indictment in this case you may consider that with all other circumstances in arriving at your verdict; which said request is refused.

Exception allowed the defendant.

12. You are instructed that while you are to take into considera-

tion the fact that this country is at war with the Imperial Government of Germany, this does not change the law which demands a fair and impartial consideration of evidence; and it does not change the weight or credibility to be given to evidence. The government and the defendant are entitled to a fair and impartial trial. You must render a verdict free from bias and free from prejudice, uninfluenced by anything except the evidence and circumstances proven in the case by witnesses who have testified in this case or other evidence admitted by the court, and the law as given to you by the court; which said request is refused.

Exception allowed the defendant.

111 13. On the 18th day of May of this year, congress passed a law which was on the same day approved by the President, entitled an act to authorize the President to increase temporarily the military establishment of the United States. It is generally referred to as the Selective Draft Law. By the terms of this law it became the duty of every male citizen, not an alien, between the ages of twenty-one and thirty-one, upon proclamation by the President to present himself for registration, at such time and place as designated by the proclamation of the President fixing the time and place of such registration and upon failing to register the law fixed a punishment upon conviction in the district court of the United States having jurisdiction of the offense; which said request was refused because covered by the charge.

Exception allowed the defendant.

14. You are instructed that within the meaning of the selective draft law and the socalled espionage act under which this prosecution is brought, it is necessary for the Government to prove beyond a reasonable doubt that the defendant did wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, to the injury of the United States, or both. It is therefore necessary for the government to prove beyond a reasonable doubt that the defendant's statements, speech or remarks were made wilfully, that is, maliciously, criminally and with a desire and with a purpose of attempting to cause insubordination, disloyalty, mutiny, refusal of duty in the military or naval forces of the United States, to the injury of the

112 United States, and in this connection it is necessary that you should understand what is meant under the law by insubordination, disloyalty, mutiny, refusal of duty in the military or naval forces of the United States or to wilfully obstruct the recruiting or enlistment of service of the United States to the injury of the United States; which said request is refused.

Exception allowed the defendant.

15. Did the alleged statements, speech or remarks of the defendant, if wilfully made, attempt to cause insubordination, that is, a failure on the part of any person or persons in the military or naval forces of the United States to abide by and conform himself or themselves to the laws, rules and regulations of the army and naval forces of the United States unless such attempt to create insubordi-

nation as defined herein is proven beyond a reasonable doubt you should disregard it; which said request is refused because covered in the charge.

Exception allowed the defendant.

16. Did the defendant attempt to cause disloyalty, and the court instructs you here that disloyalty does not mean a mere state of mind but unlawful conduct, that is, a violation of law or rules of the military or naval forces of the United States. The burden is upon the government to prove the attempt by the defendant to cause a violation of law by persons in the military or naval forces of the United States; which said request is refused because covered by the charge.

Exception allowed the defendant.

17. Did the defendant attempt to cause a mutiny in the
113 military or naval forces of the United States, and in this connection you are instructed that in criminal law a mutiny consists of the unlawful resistance or disturbances on board a ship against the authority of the commanders, or in the army an unlawful resistance in opposition to the authority of the officers, and upon this the court instructs you the government has failed to prove its case; which said request is refused because covered in the charge.

Exception allowed the defendant.

18. Did the defendant attempt to cause a refusal of duty by persons in the military and naval forces of the United States, that is, did he attempt to persuade persons who were mustered into service and who were within military and naval forces of the United States to refuse to comply with the laws, rules and regulations of the military and naval forces of the United States. This must be proven beyond a reasonable doubt or disregarded by you; which said request was refused because covered in the charge.

Exception allowed the defendant.

19. Did the defendant wilfully obstruct the recruiting and enlistment of service of the United States, and in this connection I instruct you that to obstruct as used in the law means to impede or to hinder, to interpose impediments by some act, of a physical character, which amounts to actual violence or threatened violence accompanied by the exercise of force, and this you may disregard; which said request was refused because covered in the charge.

Exception allowed the defendant.

114 20. To summarize, you must be satisfied beyond a reasonable doubt,—

(*a*) that the intent was to effect men in the military and naval forces of the United States and cause insubordination, that is, a wilful refusal to obey the laws, rules and regulations of the military and naval service, or disloyalty, that is, a wilful violation of law, or a mutiny, that is, a revolt, an unlawful resistance to superior officers within the army; or a refusal of duty to superior officers or commanders on board a ship, or a refusal of duty, that is, a willful refusal to comply with rules, regulations and laws of the military and naval forces of the United States or did the defendant willfully obstruct the recruiting or enlistment of service of the United States, that is,

did he interpose impediments by some physical act, a physical act, which amounted to actual violence or threatened violence accompanied by the exercise of force.

(*b*). That the offense complained of against the defendant was committed by him wilfully, that is, with a criminal and malicious intent; which said request was refused.

Exception allowed the defendant.

(*c*) That the intent to cause insubordination disloyalty, mutiny and refusal of duty in the military or naval forces of the United States or to obstruct the recruiting or enlistment of service was intended to effect persons within, that is, the enlisted men in the military and naval forces of the United States; which request was refused.

Exception allowed the defendant.

(*d*) That the United States suffered an injury thereby; which said request was refused.

115 (*e*) It is not sufficient that the defendant may have used language to cause persons who had registered to believe in the injustice of the selective draft law or that the conduct of the defendant may have effected the action of persons who were not in the military or naval forces of the United States. It is important for you to bear in mind that under the charge in this case only those persons are in the military and naval forces of the United States who have been impressed or mustered into actual service and an oath of allegiance being essential thereto and in determining the guilt or innocence of the defendant you must confine your judgment exclusively to the effect of anything charged against the defendant upon persons in the military or naval forces of the United States. If any of you have a bias or prejudice against the conscription law socalled, or its support it is your duty to lay that prejudice aside and not let it interfere with or effect you in the slightest degree and it is equally, your imperative duty to lay aside any prejudice or bias that you may have against the defendant and not to let that interfere or effect, you to the slightest degree in arriving at your verdict. This country is at war and as a result there is more or less popular excitement. At such a time the mere suspicion of guilt often brings down upon its victim a strong feeling of indignation and perhaps the most serious conequences to the suspected person. In reaching your decision upon the charge against the defendant in this case you should carefully and vigorously exclude from your minds all influence arising from mere popular excitement, prejudice or otherwise; which said request was refused.

116 Exception allowed.

21. If from the evidence you believe that persons in the service of and employed by the government attended the meeting addressed by the defendant and that the defendant was questioned by secret service men or employes in the service of the government and that repeated questions were asked with the object and purpose of inducing the defendant in reply to such questions to make answers thereto or to make a statement in violation of law and that it was the purpose of the secret service employes to try and secure or

induce a statement from the defendant upon which this or any other criminal charge might be based and that it was through their questions that the defendant was induced to make answers and statements and that such answers and statements did violate the law, then I instruct you such violations were procured illegally and the defendant was decoyed into making such statements and even though they were in violation of law as alleged in this indictment, under your oaths as jurors it would be your duty, even though you believe the defendant guilty, to return him a verdict of not guilty; which said request was refused.

Exception allowed the defendant.

The rulings of the court upon motions made and ruled upon by the court you must not consider as an opinion of the court upon the guilt or innocence of the defendant. You have no right to consider such rulings in determining the issue to be found by your verdict; which said request was refused, because covered.

Exception allowed the defendant.

117 Some or all of you jurors may have been present and heard me charge the grand jury in which I referred to the war and offenses growing out of it. If you were present and heard what I said at that time or read of it, then I instruct you that you must not permit it to influence you in the slightest degree in arriving at your verdict in this case. It would be highly improper for you to permit anything which you many then have heard or which you may have read to influence you in the slightest degree. Nothing then said by me was intended as an expression of opinion upon the guilt or innocence of this defendant. Under your oaths you must reach a verdict based solely upon the evidence and circumstances in evidence and the law given to you in this case; which said request was refused in part.

Exception allowed the defendant.

118 The foregoing charge of the Court and Jury as hereinbefore set forth comprises all the instructions given to the Jury in said cause.

And thereuponn the Jury rendered a verdict of guilty as charged in the indictment; and thereupon the Defendant by his counsel moved the Court for a new trial of said cause for the following reasons:

1. On the ground that the indictment does not state an offense.
2. On the ground that the indictment is indefinite and does not set forth facts sufficient to state an offense.
3. On the ground that the indictment sets forth conclusions and not facts.
4. On the ground that the evidence is not of sufficient weight and character to justify the submission of the case to the Jury.
5. On the ground that the evidence does not sustain the alleged crime charged in the indictment.
6. On the ground that the Court erred in its charge to the Jury.

7. On the ground that the Court erred in refusing all of the Defendant's requested instructions to the jury.

And thereupon the Court rendered its judgment and sentence upon the said verdict which said judgment and sentence is as follows:

That the Defendant, Abraham L. Sugarman be confined in the Federal Penitentiary at Leavensworth, Kansas, for a period of three years.

119 To Alfred Jacques, Esq., United States District Attorney, and William Anderson, Esq., Assistant United States District Attorney:

Take notice that the foregoing is hereby proposed as Defendant's Bill of Exception on motion for new trial in the cause above entitled.

SEYMOUR STEDMAN AND
LOUIS L. SCHWARTZ,
Attys. for Defendant.

November 30th., 1917.

Service of the foregoing Proposed Bill and Notice is hereby acknowledged this 30th. day of November, 1917, and we do reserve the right to propose amendments thereto and consent that the same may be settled, allowed and signed by the Judge who tried said cause as and for the Bill of Exceptions in this cause.

ALFRED JAQUES,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State of Minnesota.

District of Minnesota, Second Division.

I, Wilbur F. Booth, Judge before whom the case of the United States of America, Plaintiff, against Abraham L. Sugarman, Defendant, was tried, do hereby certify that the foregoing Bill of Exceptions on motion for new trial contains all of the evidence introduced and contains in substance all the proceedings had at the trial of said cause; that the same was served and presented within the time allowed by law and the orders of this Court and the stipulations of the parties, and that I do this day, settle, allow and sign the same as and for the Bill of Exceptions in this cause and make this Bill a part of the record thereof, without being reduced to narrative form. Allowed and certified this 17th day of December, 1917.

WILBUR F. BOOTH,
Judge of the Above-named Court.

120 (Endorsed:) Bill of Exceptions. Filed December 17th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, was filed in said court in said cause an assignment of errors and prayer for reversal in the words and figures following, to-wit:—

121 United States District Court, District of Minnesota, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

VS.

ABRAHAM L. SUGARMAN, Defendant.

Assignment of Errors.

Abraham L. Sugarman, in the above entitled cause by Seymore Stedman and Louis L. Schwartz, his Attorneys, in connection with his petition for a writ of error, makes the following Assignment of Errors which he alleges occurred upon the trial of said cause:

I.

The trial court erred in overruling the demurrer to the indictment in this, to-wit:

1. On the ground that the indictment did not state an offense.

Exception was taken by Defendant to the order of the court overruling the demurrer.

2. That the indictment stated conclusions and not facts.

3. The court erred in denying the motion to quash the indictment on the ground that the indictment did not set forth a state of facts from which there appeared to have been an offense committed.

II.

The trial court erred in the charge to the Jury to the Defendant's prejudice in this, to-wit:

1. That the court in its charge said: "that if the Government proved some of the words that had been shown in evidence it was sufficient for the Jury upon such proof to find a verdict of guilty."

Exception was taken and allowed.

2. To that portion of the court's charge wherein the court stated: "that a man has a right to honestly criticise."

Exception was taken and allowed.

122 3. To that portion of the charge in regard to investigation by the Grand Jury on the ground that it is not evidence and that the court should not have instructed in that manner. Exception was taken and allowed.

4. The court erred in refusing the request of the Defendant that the following charges be given:

a. Gentlemen of the Jury, although the arguments of counsel may have assumed a range covering several subjects, the real issue to be decided by you is strictly within the narrow compass defined by the indictment presented in this case and put in issue by the plea of not guilty entered by the defendant, and in this connection you are instructed that the indictment is no evidence against the defend-

ant, it is only a formal statement of the charge preferred against him for the purpose of enabling him to know and to meet the offense alleged against him, which said request is refused because covered.

Exception allowed the defendant.

b. The indictment in this case charged that the defendant wilfully caused or attempted to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or wilfully did obstruct the recruiting or enlistment service of the United States to the injury of the United States. The Defendant by entering a plea of not guilty denies this charge and it thereupon becomes necessary for the government to prove the charge as laid in the indictment beyond a reasonable doubt; which said request is refused because covered.

Exception allowed the defendant.

c. A reasonable doubt is such a doubt as would cause a reasonable and prudent man to pause and hesitate in the graver affairs and transactions of life. It must be a doubt based upon reason. It is not sufficient to justify an acquittal that it should be a vague or captious doubt and it is improper for you to search for a doubt. The reasonable doubt contemplated by law must arise from the evidence. That is, after you have considered all the evidence and circumstances admitted in evidence in the case and the law applicable thereto, if you have an abiding, that is, a continuing conviction that the
123 Defendant is guilty, then you have not a reasonable doubt and should find the Defendant guilty. If, however, after considering all the evidence and circumstances in evidence in the case and the law given you by the court you are uncertain and, a reasonable doubt arises in your mind as to the truth of the charge alleged in the indictment, then it is your duty to find the defendant not guilty; which said request is refused, in the form requested.

Exception allowed the defendant.

d. The law presumes the defendant to be innocent and this presumption is evidence created by law and it is your duty to start the consideration of this case presuming the defendant innocent and that presumption continues throughout the trial and during your deliberations as jurors, and it is your duty to oppose the evidence of guilt with the presumption of innocence, and in considering the instructions by the court this presumption prevails. If the evidence should be evenly balanced upon any material fact in the case, or your are in doubt as to the meaning of the law given you by the court, then the presumption of innocence created by law is such as to make it your imperative duty to determine such fact or circumstance in favor of the defendant; which said request is refused for the reason that it is covered in the charge.

Exception allowed the defendant.

e. Neither Socialism, the Socialist party or any member of the Socialist party as such is here on trial. Whether you approve or disapprove the doctrines and teachings of Socialism, the practice and program of the Socialist party and its members is wholly immaterial. Every person has a perfect right to affiliate with and belong to any political party or other legitimate organization of his own opinion,

and can not be denied that right. Every person has a right in all lawful ways and by all lawful means within his power to work for and assist the party or organization to which he may belong. Of course, this does not warrant a person under the guise or pretense of aiding or assisting any organization to commit crime or to violate the law or to procure or induce others to violate the law and here I wish to impress upon you that nothing in this charge is in-
124 tended to convey to your minds that the court believes the defendant has violated any law or that he has not violated any law. The court has no opinion, that is your province exclusively; which said request, in the form requested is refused.

Exception allowed the defendant.

f. Every citizen of the United States has a legal right to have and to express an opinion against the approval of any proposed or pending legislation and to have and also to express an opinion in opposition to proposed legislation after it has become a law and also to favor the repeal or modification of any law after it has been approved or adopted; which said request is refused in the form requested.

Exception allowed the defendant.

g. Every citizen has a right to have and express an opinion which is opposed to Conscription at either before or after the enactment of the Selective Draft Act or Conscription Act approved on the 18th day of last May; which said request is refused.

Exception allowed the defendant.

h. The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, or of the press or the right of the people peaceably to assemble and to petition for a redress of grievances. This right has been deemed so essential and necessary to free institutions and a free people that it has been incorporated in substance in the constitutions of all the states of the Union. These constitutional provisions referred to are not abrogated, they are not less in force now because of war, and they are as vital during war as during times of peace, and as binding upon you now as though we were at peace; which said request, in the form requested, is refused.

Exception allowed the defendant.

i. This provision of our constitution will not justify or warrant advocating a violation of law. A man may freely speak and write and petition, but he is responsible for the consequences of what he may say, write or publish, and if what he says and publishes has a natural tendency to produce a violation of law, that is to impel the persons addressed to violate the law, and the person using the
125 language intends that it should produce a violation of law, then the person using such language is subject to punishment and this is not inconsistent with the right and protection guaranteed by the Constitution of the United States and of this state; which said request is refused because covered in the charge.

Exception allowed the defendant.

j. You have a right to presume that the defendant intended the natural consequences of the language used by him; which said request is refused, because covered in the charge.

Exception allowed the defendant.

k. If you are satisfied that the language used by the defendant was intended to and was violating law, as charged in the indictment in this case you may consider that with all other circumstances in arriving at your verdict; which said request is refused.

Exception allowed defendant.

l. You are instructed that while you are to take into consideration the fact that this country is at war with the Imperial Government of Germany, this does not change the law which demands a fair and impartial consideration of evidence; and it does not change the weight or credibility to be given to evidence. The government and the defendant are entitled to a fair and impartial trial. You must render a verdict free from bias and free from prejudice, uninfluenced by anything except the evidence and circumstances proven in the case by witnesses who have testified in this case or other evidence admitted by the court, and the law as given to you by the court; which said request is refused.

Exception allowed the defendant.

m. On the 18th day of May of this year, congress passed a law which was on the same day approved by the President, entitled an act to authorize the President to increase temporarily the military establishment of the United States. It is generally referred to as the Selective Draft Law. By the terms of this law it became the duty of every male citizen, not an alien, between the ages of twenty-one and thirty-one, upon proclamation by the President to present himself for registration, at such time and place as designated
126 by the proclamation of the President fixing the time and place of such registration and upon failing to register the law fixed a punishment upon conviction in the district court of the United States having jurisdiction of the offense; which said request was refused because covered by the charge.

Exception allowed the defendant.

n. You are instructed that within the meaning of the selective draft law and the so-called espionage act under which this prosecution is brought, it is necessary for the Government to prove beyond a reasonable doubt that the defendant did wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, to the injury of the United States, or both. It is therefore necessary for the Government to prove beyond a reasonable doubt that the Defendant's statements, speech or remarks were made wilfully, that is, maliciously, criminally and with a desire and with a purpose of attempting to cause insubordination, disloyalty, mutiny, refusal of duty in the military or naval forces of the United States, to the injury of the United States, and in this connection it is necessary that you should understand what is meant under the law by insubordination, disloyalty, mutiny, refusal of duty in the military or naval forces of the United States or to wilfully obstruct the recruiting or enlistment of service of the United States to the injury of the United States; which said request is refused.

Exception allowed the defendant.

o. Did the alleged statements, speech or remarks of the defendant, if wilfully made, attempt to cause insubordination, that is, a failure on the part of any person or persons in the military or naval forces of the United States to abide by and conform himself or themselves to the laws, rules and regulations of the army and naval forces of the United States unless such attempt to create insubordination as defined herein is proven beyond a reasonable doubt you should disregard it; which said request is refused because covered in the charge.

Exception allowed the defendant.

127 *p.* Did the defendant attempt to cause a mutiny in the military or naval forces of the United States, and in this connection you are instructed that in criminal law a mutiny consists of the unlawful resistance or disturbances on board a ship against the authority of the commanders, or in the army an unlawful resistance in opposition to the authority of the officers, and upon this the court instructs you the government has failed to prove its case; which said request is refused because covered in the charge.

Exception allowed the defendant.

q. Did the defendant attempt to cause a refusal of duty by persons in the military and naval forces of the United States, that is, did he attempt to persuade persons who were mustered into service and who were within military and naval force of the United States to refuse to comply with the laws, rules and regulations of the military and naval forces of the United States. This must be proven beyond a reasonable doubt or disregarded by you; which said request was refused because covered in the charge.

Exception allowed the defendant.

r. Did the defendant wilfully obstruct the recruiting and enlistment of service of the United States, and in this connection I instruct you that to obstruct as used in the law means to impede or to hinder, to interpose impediments by some act, of a physical character, which amounts to actual violence or threatened violence accompanied by the exercise of force, and this you may disregard; which said request was refused because covered in the charge.

Exception allowed the defendant.

s. To summarize, you must be satisfied beyond a reasonable doubt,—

(*a*) that the intent was to effect men in the military and naval forces of the United States and cause insubordination, that is, a wilful refusal to obey the laws, rules and regulations of the military and naval service, or disloyalty, that is, a wilful violation of law, or a mutiny, that is, a revolt, an unlawful resistance to superior officers or commanders on board a ship, or a refusal of duty, that is, a willful

128 refusal to comply with rules, regulations and laws of the military and naval forces of the United States or did the defendant willfully obstruct the recruiting or enlistment of service of the United States, that is, did he interpose impediments by some physical act, a physical act, which amounted to actual violence or threatened violence accompanied by the exercise of force.

(*b*) That the offense complained of against the defendant was

committed by him wilfully, that is, with a criminal and malicious intent; which said request was refused.

Exception allowed the defendant.

(c) That the intent to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States or to obstruct the recruiting or enlistment of service was intended to effect persons within, that is, the enlisted men in the military and naval forces of the United States; which request was refused.

Exception allowed the defendant.

(d) That the United States suffered an injury thereby; which said request was refused.

(e) It is not sufficient that the defendant may have used language to cause persons who had registered to believe in the injustice of the selective draft law or that the conduct of the defendant may have effected the action of persons who were not in the military or naval forces of the United States. It is important for you to bear in mind that under the charge in this case only those persons are in the military and naval forces of the United States who have been impressed or mustered into actual service and an oath of allegiance being essential thereto and in determining the guilt or innocence of the defendant you must confine your judgment exclusively to the effect of anything charged against the defendant upon persons in the military or naval forces of the United States. If any of you have a bias or prejudice against the conscription law so-called, or its support it is your duty to lay that prejudice aside and not let it interfere with or effect you in the slightest degree and it is equally, your imperative duty to lay aside any prejudice or bias that you may have against the defendant and not to let that interfere or effect, you to the
129 slightest degree in arriving at your verdict. This country is at war and as a result there is more or less popular excitement. At such a time the mere suspicion of guilt often brings down upon its victim a strong feeling of indignation and perhaps the most serious consequences to the suspected person. In reaching your decision upon the charge against the defendant in this case you should carefully and vigorously exclude from your minds all influence arising from mere popular excitement, prejudice or otherwise; which said request was refused.

Exception allowed.

8. If from the evidence you believe that persons in the service of and employed by the government attended the meeting addressed by the defendant and that the defendant was questioned by secret service men or employees in the service of the government and that repeated questions were asked with the object and purpose of inducing the defendant in reply to such questions to make answers thereto or to make a statement in violation of law and that it was the purpose of the secret service employees to try and secure or induce a statement from the defendant upon which this or any other criminal charge might be based and that it was through their questions that the defendant was induced to make answers and statements and that such

answers and statements did violate the law, then I instruct you such violations were procured illegally and the defendant was decoyed into making such statements and even though they were in violation of law as alleged in this indictment, under your oaths as jurors it would be your duty, even though you believe the defendant guilty, to return him a verdict of not guilty; which said request was refused.

Exception allowed the defendant.

The rulings of the court upon motions made and ruled upon by the court you must not consider as an opinion of the court upon the guilt or innocence of the defendant. You have no right to consider such rulings in determining the issue to be found by your verdicts; which said request was refused, because covered.

Exception allowed the defendant.

Some or all of you jurors may have been present and heard
130 me charge the grand jury in which I referred to the war and offenses growing out of it. If you were present and heard what I said at that time or read of it, then I instruct you that you must not permit it to influence you in the slightest degree in arriving at your verdict in this case. It would be highly improper for you to permit anything which you may then have heard or which you may have read to influence you in the slightest degree in arriving at your verdict in this case. Nothing then said by me was intended as an expression of opinion upon the guilt or innocence of this defendant. Under your oaths you must reach a verdict based solely upon the evidence and circumstances in evidence and the law given to you in this case; which said request was refused in part.

Exception allowed the defendant.

III.

The trial court erred in refusing to direct a verdict of not guilty at the close of all the evidence in this, to-wit:

1. On the ground that the evidence is not sufficient and of not sufficient weight or character to justify submitting the case to the Jury.

2. On the ground that the indictment did not state an offense.

3. That the evidence does not sustain the alleged crime charged in the indictment.

Exception was taken.

Wherefore, the said Abraham L. Sugarman, defendant herein, prays that for the errors aforesaid said judgment may be reversed, vacated and held for naught and that he may be in all things restored to what he hath lost thereby.

ABRAHAM L. SUGARMAN,
By SEYMORE STEDMAN AND
LOUIS L. SCHWARTZ,
Attorneys for Defendant.

(Endorsed:) Assignment of Errors and Prayer for Reversal. Filed December 17th, 1917. Charles L. Spencer, Clerk.

131 And thereafter, and on the same day, was filed in said court in said cause a petition for writ of error, allowance of same and fixing of bond in the words and figures following, to-wit:—

132 United States District Court, District of Minnesota, Second Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ABRAHAM L. SUGARMAN, Defendant.

Petition for Writ of Error, &c.

And now comes Abraham L. Sugarman, Defendant herein, by Seymour Stedman and Louis L Schwartz, his Attorneys, and says that on the 26th day of October A. D. 1917, this court entered judgment herein against this Defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this Defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, This Defendant prays that a writ of error may issue in this behalf out of the United States Supreme Court, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Supreme Court aforesaid.

ABRAHAM L. SUGARMAN,
Defendant.
SEYMOUR STEDMAN,
By LOUIS L. SCHWARTZ,
Attorneys for Defendant.

Upon the foregoing petition for writ of error, a writ of error from the Supreme Court of the United States is hereby allowed and the bail bond pending the determination of said writ of error is hereby fixed at the sum of Seven thousand five hundred dollars, ($7,500.00), with sufficient sureties.

WILBUR F. BOOTH,
Judge United States District Court, District of Minnesota.

(Endorsed:) Petition for Writ of Error, allowance of same and fixing of bond. Filed December 17th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, was filed in said court in said cause a bail bond pending writ of error in the words and figures following, to-wit:—

133 United States District Court, District of Minnesota, Second Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ABRAHAM L. SUGARMAN, Defendant.

Bail Bond Pending Writ of Error.

DISTRICT OF MINNESOTA,
Second Division, ss:

We, Abraham L. Sugarman, as principal, and Isaac Segal and Benjamin Lifshitz, as sureties, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of Seven Thousand Five Hundred ($7500.00) Dollars, to be levied of our goods and chattels, lands and tenements, upon this condition:

Whereas, The said Abraham L. Sugarman has sued out a writ of error from the judgment of the District Court of the United States of America for the Second District of Minnesota in said District Court wherein the said United States of America is Plaintiff and the said Abraham L. Sugarman is Defendant, for a review of the said judgment in the United States Supreme Court.

Now, Therefore, If the said Abraham L. Sugarman, shall personally be and appear before the said United States District Court on the first day of the next regular term thereof, and from day to day thereafter, during said term and subsequent terms, until the determination of said writ of error, and shall abide by and perform any order or judgment which may be rendered therein in said case, and shall not depart from said United States District Court without leave thereof, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 17th day of December, A. D. 1917.

ABRAHAM L. SUGARMAN. [SEAL.]
ISAAC SEGAL. [SEAL.]
BENJAMIN LIFSHITZ. [SEAL.]

134 STATE OF MINNESOTA,
District of Minnesota, Second Division, ss:

On this 17th day of December, A. D. 1917, before me, a Notary Public, within and for said County, personally appeared Abraham L. Sugarman, Isaac Segal and Benjamin Lifshitz, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] LOUIS L. SCHWARTZ,
Notary Public, Hennepin Co., Minn.

My Commission Expires Sept. 16th, 1922.

STATE OF MINNESOTA,
District of Minnesota, Second Division, ss:

Isaac Segal and Benjamin Lifshitz being duly sworn, say, each for himself, that he is one of the sureties within named, that he is a resident and freeholder of the State of Minnesota, and worth the amount for which he justifies herein, below stated, above his debts and liabilities, and exclusive of his property exempt from execution.

ISAAC SEGAL.

Amount of Justification $7,500.00.

BENJAMIN LIFSHITZ.

Amount of Justification $7,500.00.

Subscribed and Sworn to before me this 17th day of December, 1917.

[NOTARIAL SEAL.] LOUIS L. SCHWARTZ,
Notary Public, Hennepin Co., Minn.

My Commission Expires Sept. 16th, 1922.

(Endorsed:) Bail Bond pending Writ of Error. No objection to approval of within bond. Alfred Jaques, U. S. Atty. 12/17/17. The within bond and the sureties thereon are hereby approved this 17th day of December, A. D., 1917. Wilbur F. Booth, Judge. Filed December 17th, 1917. Charles L. Spencer, Clerk.

135 And thereafter, and on the same day, was filed in said court in said cause a præcipe for transcript of record in the words and figures following, to-wit:—

United States District Court, District of Minnesota, Second Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ABRAHAM L. SUGARMAN, Defendant.

Præcipe for Transcript of Record in Obedience to Writ of Error.

The Clerk of said Court will please make and forward to the Clerk of the Supreme Court of the United States at Washington, D. C., a certified transcript of the record in the above entitled cause.

SEYMOUR STEDMAN AND
LOUIS L. SCHWARTZ,
Attorneys for Defendant.

(Endorsed:) Præcipe for Transcript of Record in Obedience to Writ of Error. Filed December 17th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, was filed in said court in said cause a writ of error from the Supreme Court of the United States, which said writ of error, with certificate of obedience thereto, here next follows:—

136 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Second Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the October Term, 1917, thereof, between The United States of America, Plaintiff, and Abraham L. Sugarman, Defendant, manifest error hath happened, to the great damage of the said Abraham L. Sugarman, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, *and* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the capitol in the city of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 16th day of January, 1918, to the end that the record and proceedings aforesaid, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 17th day of December, A. D. 1917.

Issued at office in Mankato, Minnesota, with the seal of the District Court of the United States for the District of Minnesota, Second Division.

[Seal U. S. Dist. Court, Dist. of Minnesota, Second Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

Allowed by
WILBUR F. BOOTH, *Judge.*

Filed December 17th, 1917. Charles L. Spencer, Clerk U. S. District Court, District of Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota, Second Division, ss:

In obedience to the command of the writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the records and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota, Second Division.

[Seal U. S. Dist. Court, Dist. of Minnesota, Second Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

137 And thereafter, and on the 22nd day of December, A. D. 1917, was filed in said court in said cause a citation, which said citation with admission of service thereof here next follows:

138 United States District Court, District of Minnesota, Second Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ABRAHAM L. SUGARMAN, Defendant.

Citation.

United States of America to The United States of America, Plaintiff, and to Alfred Jaques, Esq., its Attorney, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the day this citation bears date, pursuant to a Writ of Error filed in the Clerk's office of the United States District Court, for the District of Minnesota, Second Division, wherein Abraham L. Sugarman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wilbur F. Booth, Judge of the United States District Court, District of Minnesota, this 17th day of December, A. D. 1917.

WILBUR F. BOOTH,
Judge of the United States District Court, District of Minnesota.

Due and personal service of the foregoing Citation is hereby admitted this 22d day of December, A. D. 1917.

THE UNITED STATES OF AMERICA,
By ALFRED JAQUES,
United States District Attorney.

139 [Endorsed:] (Original.) United States District Court, District of Minnesota, Second Division. United States of America, Plaintiff, vs. Abraham L. Sugarman, Defendant. Citation. Seymour Stedman and Louis L. Schwartz, Attorneys. Filed December 22d, 1917. Charles L. Spencer, Clerk.

140 United States District Court, District of Minnesota, Second Division.

THE UNITED STATES, Plaintiff,

vs.

ABRAHAM L. SUGARMAN, Defendant.

I, Charles L. Spencer, Clerk of said District Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 139 pages, numbered consecutively from 1 to 139, inclusive, is a true and complete transcript of all the records, process, pleadings, orders and final judgment and all other proceedings in the above entitled cause, and of the whole thereof, as appears from the original records and files of said Court and in accordance with a præcipe for such transcript, a copy of which is included within said paging; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid and affixed the seal of said Court at Mankato, in the District of Minnesota, this third day of January, A. D. 1918.

[Seal U. S. Dist. Court, Dist. of Minnesota, Second Division.]

CHARLES L. SPENCER, *Clerk.*

Endorsed on cover: File No. 26303. Minnesota D. C. U. S. Term No. 836. Abraham L. Sugarman, plaintiff in error, vs. The United States of America. Filed January 29th, 1918. File No. 26303.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ABRAHAM L. SUGARMAN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 345.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

CHARLES T. SCHENCK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 437.

ELIZABETH BAER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 438.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CONRAD KORNMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 548.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the defendant in error and respectfully moves the court to advance the above entitled cases for hearing on a day convenient to the court.

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Each of the cases involves the validity of the conviction of the plaintiff in error therein for a violation or violations of the Espionage Act of June 15, 1917, 40 Stat. 217.

In case No. 345 Sugarman was convicted of a wilful attempt to cause insubordination and refusal of duty in the military forces of the United States by urging and advising certain men who had theretofore registered under the provisions of the Selective Draft Act of May 18, 1917, 40 Stat. 76, not to report for military service when ordered so to do by the military authorities, in violation of section 3, Title I, of the Espionage Act. This section provides that

> * * * whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

The indictment in the *Schenck* and *Baer* cases, Nos. 437 and 438, was in three counts, which charged in order, first, a conspiracy under section 4, Title I, of the Espionage Act to violate the provisions of section 3, above quoted; second, a conspiracy to commit an offense against the United States—that is, the use of the mails for the transmission of matter (circulars) declared by Title XII of the act to be

nonmailable; and, third, the use of the mails for the transmission of such matter.

In the *Kornmann* case, No. 548, there was likewise a conviction of the offense of wilfully using the mails for the transmission of a certain letter declared by the act to be nonmailable, the letter being intended and tended to cause insubordination and refusal of duty in the military forces of the United States and obstructed the recruiting and enlistment service, in violation of section 3, Titles XII and I, respectively, of the act. There was also a conviction of the offense (1) to cause and attempt to cause such insubordination and refusal of duty, and (2) to obstruct the recruiting and enlistment service, the indictment being in four counts.

Although the cases present different questions they all involve the same general question of the constitutional validity of section 3, Title I, of the Espionage Act, namely, whether or not it constitutes an abridgment of the freedom of speech and the right of petition, in contravention of the First Amendment to the Constitution. It is therefore respectfully suggested that the convenience of the court may be served by a setting of the cases for hearing on the same day.

The plaintiffs in error are at large on bail.

Notice of this motion has been served upon opposing counsel.

G. CARROLL TODD,
Assistant to the Attorney General.

OCTOBER, 1918.

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I Wharton's Criminal Procedure, 296.
Bishop's New Criminal Procedure, 452, 286.
Clark's Criminal Procedure, 249.
State v. *O'Malley*, 48 Iowa 501.
Brown v. *Commonwealth*, 2 Vir. Cas. 516.
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Commonwealth v. *Moulton*, 108 Mass. 307.

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Armour Packing Co. v. *United States*, 209 U. S. 56, 84.
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Tyler v. *Pomeroy*, 8 Allen (Mass.) 480.
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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ABRAHAM L. SUGARMAN, PLAINTIFF in error,
v.
THE UNITED STATES OF AMERICA. } No. 345.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On April 6, 1917, the Congress of the United States declared a state of war to exist between the United States and the German Empire, and authorized the President to use the whole naval and military forces of the United States and the resources of the Government in the conduct of the war. About six weeks thereafter, namely on May 18, 1917, the Selective Service Act was enacted (40 Stat. 76), providing for the raising of large armies by both volunteer service and draft, and subjecting all male citizens and declarant aliens (other than alien enemies), between the ages of 21 and 31, both inclusive, to the

draft. On June 5, 1917, the registration of all persons subject to the draft had taken place as fixed by the President. On June 15, 1917, the Espionage Act (c. 30, 40 Stat. 217) was passed. On June 30, 1917, the first Selective Service Regulations were promulgated by the President, determining the procedure for calling and examining the registrants and exempting or inducting them into the service. On July 20, 1917, the drawing took place at Washington which fixed the order in which the registrants, according to their registration numbers, would be called for examination. On July 24, 1917, the date of the event out of which this case grew, the administration of the Selective Service Law was in full progress and men of draft age were awaiting their calls for examination before the draft boards.

In the midst of this situation, on the evening of July 24, 1917, a meeting was held at Kelso Township, Sibley County, Minn., about 7 miles from Arlington, Minn. (R. 9, 58.) The meeting had been rather surreptitiously called, as no public announcement had been made nor printed notices distributed. The only notices of the meeting had been given apparently by word of mouth or over the telephone (R. 9, 33, 42, 58). The announcement, however, must have been quite extensively given, for the audience which gathered was estimated at from five to eight hundred persons, coming from all directions and from points as high as 25 miles distant (R. 17, 19, 29, 54). The automobiles in which the members of the audience had come numbered over 200 (R. 29, 37, 43).

It does not appear that the plaintiff in error, Abraham L. Sugarman (hereinafter referred to as the defendant), had any part in the calling of the meeting. He received an invitation to speak thereat and was the chief speaker, having been assigned to this meeting by, presumably, the St. Paul, Minn., Local of the Socialist Party (R. 10, 13, 37, 58). It was stated that previous to his arrival a petition praying for the repeal of the Selective Service Act had been circulated among the audience (R. 15, 46). The defendant brought with him a petition addressed to Congress asking that the Selective Service Act be submitted to a vote of the people, but it does not appear that any attempt was made to get signers thereto (R. 52). In fact, Sugarman arrived at the meeting quite late, began to speak immediately upon his arrival, finished his speech toward midnight, and then most of the audience quickly left the premises (R. 16, 25, 27.) If he came to obtain signatures to such a petition, he abandoned that mission or did not have the opportunity to carry it out.

The meeting was held out of doors, in the rear of a country town hall (R. 9, 33). The audience contained very few women, and young men predominated (R. 19). The number of men in the audience of draft ages was variously estimated by the witnesses at from 40 or 50 to as many as 50 per cent of the whole audience. The Government's witnesses identified 15 of these registrants by name, some of whom themselves testified to the events of the meeting (R. 18, 30, 37, 54).

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In the course of his address, as described by the Government's witnesses, the defendant, Sugarman, attacked the war as a capitalists' war, mentioning specifically certain capitalists, as for instance J. P. Morgan and Rockefeller, whom he called the "pals" of President Wilson. After attacking the war as a purely commercial war, he then proceeded to state "This is a war of the rich man." Then followed statistics of the small percentage of Americans owning their own homes, and turning to a portion of the audience, he said: "Can you imagine anybody going on and fighting for his landlord?" He declared the Selective Service Act to be unconstitutional and to impose no obligation on the part of the people to abide by it. "This is supposed to be a free country. Like hell it is"! is a quotation from that part of the address which dealt with the draft law. Proceeding on this same theme, he said, "This is not the first time that conscription was ever tried in this country; they tried conscription during the Civil War. How did it work out? There was a small town near Augusta, Me., which said 'We will not be conscripted.' What did they do? They seceded from the Union. Not one man from that community was drafted during the Civil War, and the reason they were not drafted was because they stuck together. That is an example of what you people can do by sticking together." Further in the course of this speech, he stated: "In St. Paul there were thousands of Socialists who did not register and the Government didn't bother them, except now and then one of them

is picked up, merely as a sop to the public or to appease the public, but the rank and file of them were not bothered at all and it is just a question of sticking together." Later, possibly as an answer to a question from the audience, although this is not quite clear, he said: "The conscription officer would have a hell of a time if he came around here to-night, wouldn't he?" Some one in the audience asked: "Do the Socialists generally refuse to register?" To which he answered: "There were thousands of them in St. Paul who did not register." Another in the audience asked why, if there were so many Socialists who refused to register, the Government did not arrest them? To which the defendant finally answered: " They don't arrest them because there are so many of them; they simply don't bother them; they just let them go." He was asked why he himself had registered, and answered that he had registered because the leaders of his party had concluded that he would be more valuable out of jail than in jail and, to please them and for the good of the party, he had registered against his own wish. (R. 38, 39, 40.)

This description of the salient features of the speech was substantially corroborated by all of the Government's witnesses (R. 12, 18, 30, 44). Other passages along the same line could be quoted. The defendant himself took the stand, did not attempt to testify as to what he had said at the meeting nor to deny the description of nor the quotations from his address as testified to by the Government's witnesses, but rested

content with a general denial that he had attempted or intended to urge, counsel, or advise any men to disobey the law or refuse military duty (R. 52).

The Government's testimony further shows that, either during the meeting or while the crowd was standing around the defendant immediately after the meeting, one of the audience asked him: "What would you advise anyone to do who had registered if a conscription officer came around to get you?" To which the defendant answered: "All that will happen, your number will be called, and if you refuse to respond to your number, you know what will happen to you; but, at any rate, you won't be shot in France." The questioner persisted in asking what the defendant advised them to do. The defendant answered: "Well, if you people all stick together, like those 5,000 Socialists down in St. Paul, the chances are that the Government will not molest you, and you will go right along running your farm and raising your pigs just as you are doing to-day." (R. 39; see also 25, 30, 31.) This conversation between a member of the audience and defendant was denied by defendant and his witnesses (R. 52, 54, 55).

The defendant was indicted for wilfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States in violation of Section 3, Title I of the Espionage Act (act of June 15, 1917, c. 30, 40 Stat. 217), by urging, counseling, and advising a number of young men, registrants under the Selective Service Law, fifteen of whom are named in the indictment, not to report

when ordered to do so by the military authorities. The text of this section is appended in the margin hereof.[1] A demurrer to the indictment was interposed and was overruled by the court. Thereupon the defendant made a motion to quash the indictment, which was overruled. The defendant plead not guilty. At the end of the Government's testimony in chief the defendant moved for a directed verdict. This was overruled by the court. The jury found the defendant guilty. A motion for arrest of judgment and a new trial was overruled.

While the record shows a long list of assignments of error, the plaintiff in error has in his brief reduced these to two points against the sufficiency of the indictment, objection to two portions of the charge to the jury and an attack on the constitutionality of Section 3 of Title I of the Espionage Act. One of the points raised against the indictment and one of the objections to the charge raised an identical question of law; so that the contentions of the plaintiff in error are ultimately reduced to the following:

1. That the indictment fails to state facts with sufficient particularity or completeness to constitute an offense;

[1] SEC. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

2. That the indictment and the charge are based upon the erroneous theory that men who are registered under the Selective Service Act are a part of the military forces of the United States;

3. That the court erred in charging the jury that proof of "some of the words" attributed to the defendant was sufficient, with proof of intention, etc.;

4. That the defendant's statements upon which the prosecution is based are within the protection of freedom of speech guaranteed by the First Amendment of the Constitution.

As shown hereinafter, the Government claims that the plaintiff in error's brief demonstrates that there is not sufficient basis for the jurisdiction of this court in this case; but, for completeness and order, the said four points are discussed in the same order, contending:

1. That the indictment is sufficient:

2. That persons registered under the Selective Service Act and subject under that Act to call for military service fall within the expression "members of the military forces" in Section 3, Title I, of the Espionage Act;

3. That the alleged objectionable words in the charge have, as appears from the context, been misconstrued and distorted by the plaintiff in error; and

4. That the constitutionality of Section 3, Title I of the Espionage Act is settled and obvious; that the plaintiff in error's contention is unsubstantial, unreal, and frivolous, and, therefore, the case should be dismissed for lack of jurisdiction.

I.

The indictment is sufficient.

The defendant contends that the indictment fails to state facts necessary to constitute an offense, in that it did not set forth in full the exact words which the defendant is charged with having uttered. The indictment in this case, however, does much more than describe the offense in the language of the statute. It charges the defendant, in the words of the statute, with "felonious and willful attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States," and then proceeds to name 15 members of the forces upon whom this attempt was exercised, to specify the date of this attempt, thus identifying the accusation against the defendant with more than sufficient particularity, and then describes the character and substance of the method used by the defendant to accomplish his purpose, namely by urging, counseling, and advising these named men and many others not to report for military service when ordered to do so by the military authorities of the United States.

This indictment is obviously sufficiently detailed and particularized to inform the defendant of the exact nature and time of the offense with which he is charged and satisfies all the requirements of criminal pleading.

The defendant cites cases relating to that type of crime in which the words themselves, as distinguished from their substance and effect or the purpose with which they are used, constitutes the gist of the offense, as for instance, the use of obscene language or libel. Such cases do not apply to the case at bar, where the attempt to cause insubordination, etc., is the gist of the offense, the particular words used in any case constituting the evidentiary details of the method by which the unlawful purpose was carried out. In a case of this character the indictment is sufficient when, as in the record at bar, it includes a statement of the general nature, purport, and effect of the words used. All further details would be pleading evidence.

In *Commonwealth* v. *Moulton*, 108 Mass. 307 (1871), the defendant was indicted for verbally threatening to accuse another of a crime with intent thereby to extort money. The indictment, though omitting to specify the words of the threat, was held sufficient, because it set forth the substance of the threat. The court said, on page 308:

> The gist of the offence is the intent to extort money by a malicious threat to accuse of some crime. The words used do not constitute the offence, without the accompanying intent to extort. And the case does not fall within those where the words themselves are alone the gist of the offence, as in indictments for scandalous or contemptuous words spoken to a magistrate, for seditious or blasphemous words, or for libel. In such cases, the words must indeed be set forth with par-

ticularity. *Commonwealth* v. *Kneeland*, 20 Pick. 206. *Commonwealth* v. *Wright*, 1 Cush. 46. *Commonwealth* v. *Tarbox*, Ib. 66. *Regina* v. *Tiddeman*, 4 Cox Crim. Cas. 367.

See also—

Commonwealth v. *Goodwin*, 122 Mass. 19 (1877).

Clark's Criminal Procedure (2d Ed. 1917), 249.

When the tendency of the words used, rather than the particular words themselves, constitute the gist of the offense, it is sufficient for the indictment to charge this general tendency, without detailing the particular words.

1 Wharton's Criminal Procedure, 10th Ed. 296.

An indictment charging the defendant with "verbally threatening to kill and murder" was held sufficient in *State* v. *O'Malley*, 48 Iowa, 501 (1878), notwithstanding the fact that it did not set out the words used.

Bishop says in his *New Criminal Procedure*, page 286:

> The rule for the indictment is that, subject perhaps to exception, it may set out the facts according to their legal import or their outward form, at the pleader's election. Thus a written instrument introduced into a pleading may, except where special reason forbids, be described either by its legal effect or by its words (citing *United States* v. *Heinze*, 161 Fed. 425).

See also *Bishop's New Criminal Procedure*, page 452.

These rules relating to writings apply equally to spoken words. *Clark's Criminal Procedure*, page 249.

Where a writing is relied on as proof or evidence of the facts charged, and not as in itself constituting the offense, it may be described in a general manner and need not be set out.

People v. *Warner*, 5 Wend. 271 (1830).

In *Brown* v. *Commonwealth*, 2 Vir. Cases, 516 (1826), the court held sufficient an indictment for sending in the form of a letter a challenge to fight a duel, which set out neither the words used nor the substance thereof.

The indictment specified the date of the defendant's offense. He was thereby informed that it arose out of his Kelso speech. The indictment gave him the names of fifteen members of his audience of draft age. It told him the general nature of the charge and the general nature and effect of his utterances on that occasion. It left no room for surprise. The indictment fully advised the defendant of the nature of the issues in the case. He did not move for a bill of particulars setting forth the exact words attributed to him. Had he made such a motion and had it been overruled, that would not, under the above authorities, have been error and could not possibly have been prejudicial. The defendant himself took the stand and did not attempt to testify to the words used by him, but contented himself with denying the general nature

of his remarks to be as alleged in the indictment. This is plainly a case in which an appellate court will not consider an objection which is, at best, a matter of form only and involves no prejudice to the interests of the defendant.

U. S. R. S. sec. 1025 provides:

> No indictment found and presented by a grand jury in any District or other Court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84 (1907), this court said:

> Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.
>
> In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.
>
> Had it been made by demurrer or motion and overruled, it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in

which the offense charged was committed. See U. S. Rev. Stat. 1025; *Connors* v. *United States*, 158 U. S. 408, 411.

There can be no doubt that the accused was fully advised of and understood the precise facts which were alleged to be a violation of the statute.

See also—

Lamar v. *United States*, 241 U. S. 103, 116 (1916).

Roberts v. *United States*, 248 Fed. 873.

Dunlop v. *United States*, 165 U. S. 486, 491.

Rosen v. *United States*, 161 U. S. 29, 34, 36.

Bartell v. *United States*, 227 U. S. 427.

The case of *U. S.* v. *Schutte*, 252 Fed. 212, cited and extensively quoted on page 12 of defendant's brief does not support his contentions. It arose upon a demurrer to the indictment which set forth only the utterances made by the defendant, with nothing whatever to show that they had been made to an audience containing persons subject to military service or any other circumstances surrounding the utterances themselves from which an inference of the unlawful intent or purpose could possibly be drawn. The court correctly held that the utterances in and of themselves did not demonstrate the criminal intent or purpose. In the case at bar the indictment charged and the proof demonstrated that the audience included men subject to military service.

II.

Persons registered under Selective Service Act and awaiting call from draft boards fall within "Military forces of the United States."

Apart from the jurisdictional question referred to in the "Statement of the Case" and to be discussed later in the brief, the main issue in this case is the question whether persons who have registered for the draft and have received their serial numbers and are awaiting call for examination before the draft boards constitute members of the "military forces of the United States" within the meaning of that clause of section 3, Title I, of the Espionage Act upon which this case is based.

The history of the statutes in the United States relating to military service, beginning with the statute of 1792 and going down through the Selective Service Act itself, shows that in the evolution of the Federal military policy, male citizens and declarant aliens of the ages designated in the statutes (eighteen to forty-five) came to be treated as constituting the national or military forces of the United States, subject to call into active duty whenever the emergecy might require, and in the Espionage Act, the expression "military forces of the United States" was intended to have the significance which had become attached to this phrase in the course of this statutory evolution. Furthermore, while the principle of strict construction of penal statutes applies here as elsewhere, in questions of statutory interpretation it is the intention of Congress, which is always the object of the

inquiry; and, in considering the meaning of any part of the Espionage Act, the tremendous emergency for which Congress was legislating should be kept in mind. That Act was pending contemporaneously with the Selective Service Act itself, and it was passed a few weeks after Congress had determined upon the raising of great new armies under that act. The evident design of this Section 3 of the Espionage Act was to protect from deliberate obstruction and interference the whole process of raising these great armies. In view of this situation, it may fairly be determined, that in the use of the expression "military forces of the United States," which had therefore received a special significance in the military statutes of the country, Congress intended to cover the whole body of persons constituting the national forces, including those in active service, those in any stage of the process of induction into service and those in reserve. This expression has come for construction before practically every district court in the United States, and with but three or four exceptions, they have given it the broader rather than the excessively narrow interpretation for which the defendant contends.

(a) Statutory history of phrase, "Military forces of the United States."

A detailed description of the statutory history of the Federal policy relating to the organization of military forces begins with "An Act more effectively to provide for the National Defense by establishing an uniform militia throughout the United States (Act of May 8, 1792, c. 33, 1 Stat. 271). In the first

section, this provides "that each and every free able-bodied male citizen of the respective States who is or shall be of the age of eighteen years and under the age of forty-five years shall severally and respectively be enrolled in the militia, etc." It is to be noted that this provided for the enrollment into the militia forces of the "citizens of the respective States," and not the citizens of the United States nor any declarant aliens. This statute represents the beginning of that mixed system of State and Federal militia or rather State militia under varying degrees of Federal control, which, until the Civil War, was relied upon, together with the Regular Army and occasional volunteer armies, to constitute the national forces. Amongst the decisions interpreting these early militia statutes is *Tyler* v. *Pomeroy*, 8 Allen (Mass.), 480, 493, where the court said:

> Under this power to organize (the militia) Congress has the exclusive power of determining who shall constitute the militia, and all persons coming within the class defined by Congress are members of the militia *without any act of their own.*

This is an early recognition of the principle that a man becomes a member of the forces by virtue of the statute itself and may be treated as a deserter subject to court-martial, though he fails to report for service and fails to take any steps himself toward induction into service. See also, to the same effect,

Opinion of Justices, 14 Gray, 614.
McCall's Case, Federal Cases, No. 8669.
Kneedler v. *Lane*, 45 Pa. St., 238.
Houston v. *Moore*, 5 Wheaton, 1.
Martin v. *Mott*, 12 Wheaton, 19.

This principle has received uninterrupted judicial sanction, including cases arising under the Selective Service Act itself.

From the beginning of our national history and especially during such periods of emergency as the War of 1812, the Mexican War, and the Civil War, the inadequacies of the military organization were pointed out by Army officers and others. It was not, however, until the breakdown of this State militia and volunteer system in the Civil War, that Congress was prevailed upon, in the Act of March 3, 1863, to create a great national force, consisting of all male citizens and declarant aliens of the designated ages, subject to compulsory service when called.

This period of the statutory history of the Federal military policy has been recently summarized by this court in the *Selective Draft Law Cases* 245, U. S. 366, 384 in the following language:

> And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State (Act of May 8, 1792, c. 33, 1 Stat. 271)

which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the States according to their quota to be trained as directed by Congress and to be called by the President as need might require. (Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 36, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of March 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705). When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border (Upton, Military Policy of the United States, pp. 99 et seq.), the Government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the

authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the Proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the States in accordance with the previous acts of Congress. (Proclamation of April 15, 1861, 12 Stat. 1258). That force being inadequate to meet the situation, an act was passed

authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. (Act of July 22, 1861, c. 9, 12 Stat. 268). This was soon followed by another act increasing the force of the militia to be organized by the States for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863, c. 75, 12 Stat. 731, was adopted entitled "An Act for enrolling and calling out the National Forces and for other purposes." By that Act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the

militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July 1863, of February and March, 1864, of July and December 1864, producing a force of about a quarter of a million men. (Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866). It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

This Civil War statute (Act of Mar. 3, 1863, c. 75, 12 Stat. 731) provided in the first section thereof:

> That all able-bodied male citizens of the United States and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years,—are hereby declared to constitute the *national forces* and shall be *liable*

to perform military duty in the *service* of the United States when called out by the President for that purpose.

Section 3 provided:

> The *national forces of the United States* not now in the military service, enrolled under that Act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of 20 and 35 years, and all unmarried persons subject to military duty above the age of 35 and under the age of 45; the second class shall comprise all other persons subject to do military duty, and they shall not, in any district, be called into the *service* of the United States until those of the first class shall have been called.

Section 13 provides:

> And any person failing to report after due service of notice (to report for duty) * * * shall be deemed a deserter * * * and sent to the nearest military post for trial by court martial.

This statute is significant. It marked a radical change in the Federal military policy. The first matter of note in its language is that it converts into the military forces not, as in the case of the old militia statutes, the "citizens of the States," but the "citizens of the United States" of the designated classes and ages. It also includes declarant aliens. It further makes a clear distinction between "forces" and "service." All citizens and declarant aliens of

the designated classes and ages are declared to constitute the "national forces," which are then divided into two subdivisions, those in the service and those not yet inducted. This creation of a "national force," consisting of male citizens of the United States and declarant aliens of certain ages, from which drafts into the Federal service may be made from time to time as the emergency may require and the President or Congress may direct, has been continued and recognized ever since this statute of 1863 down to the present, including the Selective Service Act and its supplements.

The next general military statute was passed for the Spanish-American War, being the act of April 22, 1898 (30 Stat. at Large 361), the first section providing:

> All able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States * * * between the ages of 18 and 45, are *hereby declared to constitute the national forces* and, with such exceptions and under such conditions as may be prescribed by ' w, shall be *liable* to perform military *duty* in the *service* of the United States.

The only change made by this statute was the extension of the age limits to include all over eighteen. It maintains the creation of "national forces" and the distinction between "forces" and "service." This statute has never been repealed. It is still the law and makes every citizen of the United States

and declarant alien of the designated ages and classes a member of the "military forces of the United States."

On June 3, 1916, in the face of an impending emergency which might require a largely increased and reorganized Army, Congress passed the National Defense Act (39 Stat. c. 134, 197). After describing the organization of the Regular Army and Reserve Officers, this statute provides, in section 57, as follows:

> Composition of the militia. The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States who shall be more than 18 years of age and, as hereinafter provided, not more than 45 years of age, and said militia shall be divided into three classes—the National Guard, the Naval Militia, and Unorganized Militia.

The statute then proceeds to deal with the organization of the National Guard and National Guard Reserve, obviously constituting the successors of the old State militia, under a mixed State and Federal control. It is to be noted, however, that it provides for the draft of the individual members of the National Guard into the Federal forces, and section 57 itself speaks of the "Militia of the United States." The statute contains no further reference to the Unorganized Militia, which remains, therefore, obviously in the light of the statute of 1863 and the unrepealed

statute of 1898, simply that portion of the "national forces" which has not been inducted into the organized Regular Army or National Guard.

The Selective Service Act makes no change in this situation. It provides for bringing the Regular Army and National Guard up to their maximum strength, for certain volunteer bodies, and for the drafting into new national armies of that portion of the remainder of the "national forces" falling between the ages of twenty-one and thirty-one. Later in the war, provision was made for the drafting of the rest of the "national forces" falling between the ages of eighteen and forty-five.

It is to be noted in this connection, that the process of selecting men for active service provided in the Selective Service Act is a process of exclusion and not of inclusion. All of the designated classes and ages are liable to active service unless exempted as provided in the statute. Taken in connection with the unrepealed Act of 1898 and the National Defense Act, the draft sections of the Selective Service Act simply provide the call into service of a portion of the existing "national forces."

The decisions under the Selective Service Act, as under the draft acts of 1863 and 1898, clearly uphold the jurisdiction of courts-martial to try and punish as deserters men who fail to respond for service when called into service by the draft boards. The question was fully discussed in *Franke* v. *Murray*, 248 Fed. 865, a decision of the Circuit Court of Appeals, Eighth Circuit, the court deciding squarely against

the contention of a registrant, who had failed to respond to the call for service, that as he had not entered the military service, he must be treated as a civilian and not subject to the military tribunal.

The history and development of the Federal statutes upon compulsory military service clearly demonstrate, therefore, that the "national forces" include the whole body of able-bodied males, both citizens and declarant aliens, of the ages of eighteen to forty-five years. The Selective Service Act designated the portion of these forces between the ages of twenty-one and thirty-one as immediately subject to the call into service. Section 3, Title I of the Espionage Act, passed at about the same time, was designed to protect the process calling them into the service. The distinction which the defendant seeks to make between "military forces" and "national forces" is obviously untenable. Our national forces, in the sense of all those who contribute to the national strength, financial and industrial as well as military, could not be limited to persons under forty-five; so where national forces are referred to as the males of certain limited ages, especially in statutes dealing exclusively with the subject of armies, "national forces" and "military forces of the United States" are obviously synonomous expressions.

(b) Interpretation contended for by defendant would render a portion of the section superfluous and without effect.

This interpretation also finds support in the provisions of the clause of the Espionage Act itself involved in this case. This clause provides for the

punishment of persons who "cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States." Insubordination, disloyalty, mutiny, or refusal of duty on the part of a soldier in the service is and, of course, always has been a violation of the Articles of War. Article 22 prohibits mutiny or sedition. Article 47 prohibits desertion and provides for the punishment thereof. Article 62 covers all crimes not capital and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in other articles. Consequently section 332 of the Penal Code provided for the punishment of any person guilty of causing one in the military service to commit any such offense. Therefore no statute was needed at the time of the passage of the Espionage Act to reach those who caused insubordination, etc., on the part of men in military service. On the principle, therefore, that no portion of a statute should be given an interpretation which would render it an absolutely superfluous and unnecessary piece of legislation, some significance and effect should, if possible, be sought in the language used by Congress. The clause is a blanket clause, intended to cover all attempts, successful or unsuccessful, to cause unlawful disobedience to the constituted authorities on the part of men either already in the military service or subject to call into that service.

(c) Decisions of the courts.

As above stated, the question has been passed upon by almost all District Courts and with an overwhelming preponderance in favor of the decision of the trial court in this case. Two of these decisions are reported, namely *U. S.* v. *Hall*, 248 Fed. 150, which supports the defendant and *U. S.* v. *Boutin*, 251 Fed. 313, which supports the Government. Most of these decisions being contained in the charges to the jury have not found their way into the Federal Reporter. The Department of Justice has printed in a series entitled "Interpretation of War Statutes" a number of bulletins containing decisions of the courts on the war statutes, and the following references are to such bulletins.

The following are some of the decisions in United States District Courts which clearly hold the expression "military and naval forces of the United States" to include all persons registered under the Selective Service Act:

United States v. *Huhn*, District of Wyoming, Bulletin 58.

United States v. *Wolf*, Eastern District of New York, Bulletin 81.

United States v. *Mackley*, District of Vermont, Bulletin 83.

United States v. *Frerichs*, District of Nebraska, Bulletin 85.

United States v. *Rhuberg*, District of Oregon, Bulletin 94.

United States v. *Sandvick*, District of Alaska, Bulletin 113.

United States v. *Rutherford* et al., Eastern Dist. N. Y., Bulletin 119.

United States v. *Goldsmith*, Southern Dist. of Alabama, Bulletin 133.

United States v. *Debs*, Northern Dist. of Ohio, Bulletin 155.

United States v. *Coldwell*, District of Rhode Island, Bulletin 158.

United States v. *Reeder et al.*, Western Dist. Oklahoma, Bulletin 161.

The following are cases which give a still broader interpretation and, following the statutes above referred to, hold that the expression includes all male citizens and declarant aliens of the ages of eighteen to forty-five years:

United States v. *Vincente Balbas Capo*, Dist. Porto Rico, Bulletin 37.

United States v. *Zittel*, Western Dist. of Wash., Bulletin 90.

United States v. *Stokes*, Western Dist. of Missouri, Bulletin 106.

United States v. *Hitchcock*, Northern Dist. of Ohio, Bulletin 122.

United States v. *Weinsberg*, Eastern Dist. of Missouri, Bulletin 123.

United States v. *Youngman*, Southern Dist. of Alabama, Bulletin 137.

United States v. *Denson*, Northern Dist. of Alabama, Bulletin 142.

United States v. *Wishek*, District of North Dakota, Bulletin 153.

United States v. *Hicks*, Western Dist. of Oklahoma, Bulletin 160.

A typical expression of the larger reasons for the interpretation contended for by the Government is the following quotation from the charge to the jury in *United States* v. *Huhn* in the District Court of Wyoming, Bulletin No. 58:

> Considering the broad purposes of the selective-draft act, and considering the evils that were intended to be met by the statute under which this indictment was drawn, you are instructed that the words "military forces" as therein used, is to be given a broad rather than a narrow meaning, and held to mean not merely the men in active military service, but also the men who had registered as required by law.

The following quotation from the charge to the jury in *U. S.* v. *Stokes*, Bulletin 106, illustrates the reasons in support of the prevailing and, as we contend, the correct view:

> Discussing then the nature of the publication and its adaptability to the accomplishment of the purpose charged, it is proper first to define to you what is meant by the military or naval forces of the United States. In the first place, they include all in active service, either in training at military or naval camps or within the body of the Army and Navy in actual service after the period of training has been completed. In the next place, by act of Congress, still in force, all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United

States, under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are declared to constitute the national forces, and, with such exceptions and under such conditions as may be provided by law, shall be liable to perform military duty in the service of the United States. Third, by the selective service act of May 18, 1917, the President was authorized to increase temporarily and for the purposes of this war the Military Establishment of the United States. All male persons between the ages of 21 and 30 inclusive, were required to register on the 5th day of June, 1917. They did so to the number approximately of ten millions. All were given a serial number, and subsequently thereto and from time to time have been, are being, and will be drawn and placed in active service according to their classes and physical ability and as necessity may arise. All such male persons so registered and having received their serial number subjecting them to call are a part of the military and naval forces of the United States. It will thus be seen that such military and naval forces consist of those already at the front, in training camps preparatory thereto, and among the body of the people subject to call and enlistment for military and naval service.

A similar charge to the jury though perhaps not applicable to the facts of the case was upheld by the Circuit Court of Appeals, Third Circuit, in *United States* v. *Krafft*, 249 Fed. 919.

III.

The court did not err in the use of the phrase "some of the words," as this plainly referred to some of those words or expressions of the defendant in which he urged disobedience of the Selective Service Act.

The defendant contends that the court erred in the following passage in the charge to the jury:

> It is for you to determine from the evidence whether the words claimed by the Government to have been uttered by the defendant at this time and place, or some of them, or substantially these words, were in fact uttered by the defendant at the time and place in question. If you fail to find that the words charged by the Government, or some of them, or substantially those words, were uttered by the defendant, at the time and place in question, then the defendant cannot be convicted in this case, and your verdict should be for acquittal. But if after a full and fair consideration of the evidence you are satisfied beyond a reasonable doubt that the defendant did utter the words claimed by the Government, or substantially those words, or some of them, then you will consider whether the defendant intended, by the use of the words, to produce insubordination, disloyalty, or refusal of duty in the military forces of the United States, that is, in the men present who had registered under the Conscription Act.

The point attempted to be raised by the defendant is that, as, amongst the numerous quotations from defendant's utterances which were placed before the

jury, there were a few words which were in and of themselves harmless, the above passage would have permitted the jury to base a verdict of guilty upon these few harmless words, even though they did not believe the defendant guilty of uttering any of the objectionable sentiments. But the charge, taken as a whole, shows plainly that "some of them" was intended to mean some of the numerous objectionable utterances attributed to the defendant and could not have been given any other meaning by the jury. The whole case related to portions of a lengthy address, and the charge unmistakably related exclusively to those portions of the address which were of a nature to cause insubordination, disloyalty, and refusal of duty. The court gave to the jury in complete detail the various utterances with which the Government's witnesses had charged the defendant (R. 61, 62), occurring in different portions of his address or in colloquies with different members of the audience, and then proceeded in the language objected to by the defendant, plainly meaning, not that the jury might base a verdict of guilty upon a harmless word here and there occurring in the midst of these seditious utterances, but might base such verdict upon some of these seditious utterances without necessarily believing the defendant guilty of all of them.

IV.

Statute clearly constitutional—Defendant's contention unsubstantial and without merit and insufficient on which to base jurisdiction of this court in this case.

The defendant's attack upon the constitutionality of Section 3, Title I, of the Espionage Act is without merit. That section specifies three types of offenses, only one of which is involved in this case. Leaving out those portions which deal with the other types, the section reads:

> Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, shall be punished, etc.

Surely the mere text of the statute disposes of the question of constitutionality. The power to make war and to raise and support armies, certainly includes the power to punish those who deliberately attempt to stir up disloyalty and insubordination amongst the forces with which the war must be carried on. The language used by defendant and addressed to members of the military forces was plainly of a nature to stir up disloyalty and insubordination amongst them, in fact, counseled disobedience to the requirements of the draft law, and the jury has found that it was the defendant's intention to attempt to bring about that result. This clause of the statute, whose constitutionality is obviously beyond question, applies unmistakably to the facts

of this case, as testified to by the Government's witnesses and found by the jury.

Were it necessary to cite a precedent for upholding the validity of statutes which provide for the punishment of those who counsel disobedience to the Selective Service Act, such precedent would be found in the recent decisions of this court in the cases of *Goldman* v. *United States*, *Kramer* v. *United States*, and *Ruthenberg* v. *United States*, 245 U. S. 474, 478, 480. In those cases this court affirmed convictions based on speeches and similar activities quite analogous to the defendant's utterances in the case at bar. In the *Kramer* case, for instance, the circulars distributed by the defendants therein pictured the war as a capitalists' conspiracy. In the *Goldman* case, Emma Goldman, in her speech, used an argument quite analogous to one advanced by Sugarman, namely, that if enough men refuse to serve, the Government would find itself helpless to enforce the draft law. In the *Ruthenberg* case, which, like the case at bar, was concerned with a speech by a socialist leader at a public meeting purporting to relate to the attitude of the Socialist Party toward the war, one of the defendants advanced the same thought as expressed by Sugarman herein, namely, that imprisonment in America is preferable to being shot in France. In short, with a difference in the choice of words used, quite natural to different speakers, the sentiments expressed by the defendants in the earlier cases corresponded to the defendant's utterances in the case at bar. The fact that they were prosecuted

under sections 37 and 332 of the Penal Code, whereas the defendant has been charged under the Espionage Act, is, of course, irrelevant to the question of the constitutionality of punishing those who address such sentiments to men of draft ages.

In the *Goldman*, *Baker* and *Ruthenberg* cases, no constitutional point was raised or discussed except that of the constitutionality of the Selective Service Act itself; for, obviously, if that statute is valid, the constitutionality of prohibiting attempts to cause violations thereof necessarily and inevitably follows. There is, therefore, no merit in the constitutional point raised in this case, and it must have been inserted for the sake of giving a colorable claim to the appeal to this court. The frivolous nature of this constitutional point could not come clearly to the Government's attention until the defendant's brief was filed, so that this has been the first opportunity to raise with complete assurance the question of the jurisdiction of this court. Attention is, therefore, directed to the fact that the printed record and defendant's brief demonstrate that this case is not genuinely and seriously one, which in the language of section 238 of the Judicial Code, "involves the construction or application of the Constitution of the United States or in which the constitutionality of any law of the United States is drawn in question," and, therefore, is not a case falling within the jurisdiction of this court.

Gwin v. *United States*, 184 U. S. 669 (1902).

Objection to the jurisdiction of the court may be raised at any stage of a case. See *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382, which was quoted with approval in *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419 (1910).

Lampasas v. *Bell*, 180 U. S. 276, 282 (1900).

In *Farrell* v. *O'Brien*, 199 U. S. 89 (1905), this court held it to be settled that the mere averment of a constitutional question is not sufficient where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason, citing *Fayerweather* v. *Ritch*, 195 U. S. 276, 299. This decision was followed with approval in *Goodrich* v. *Ferris*, 214 U. S. 71 (1909).

In *Brolan* v. *United States*, 236 U. S. 216 (1914), it was held that if the constitutional question relied upon as a basis for the court's jurisdiction was frivolous, it affords no basis for jurisdiction. This case was followed in *Weber* v. *Freed*, 239 U. S., 325 (1915).

CONCLUSION.

There are no errors apparent upon the record of this case; and, by reason of the jurisdictional defect disclosed by the record and defendant's brief, the petition in error should be dismissed.

JOHN LORD O'BRIAN,
The Special Assistant to the Attorney General for War Work.

ALFRED BETTMAN,
Special Assistant to the Attorney General.

JANUARY, 1919.

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BRIEF OF PLAINTIFF IN ERROR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917.

No. 836 345

ABRAHAM L. SUGERMAN,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the District of Minnesota.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

No. 836.

ABRAHAM L. SUGERMAN,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the District of Minnesota.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error in this case, Abraham L. Sugarman, whom we shall refer to for brevity as the defendant, was convicted and sentenced to the penitentiary at Ft. Leavenworth, Kansas, for a term of three years for violation of Section 3 of the "Espionage Act." The indictment presented against the defendant was as follows:

> (a) "* * * That heretofore, to wit, on the (2-3) 24th day of July, A. D. 1917, the United States then and there on said date being at war, one Abraham L. Sugarman, late of said division and district, then and there being at the Township of Kelso, in the County of Sibley, in the State and District of Minnesota, and

within the jurisdiction of this court, did feloniously and wilfully attempt to cause *insubordination, disloyalty, mutiny and refusal of duty* in the military forces of the United States, to the injury of the service and of the United States, by then and there urging, counseling, and advising a number of young men, to wit: Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Vonder Brelje, Edward Weskworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Bort. Mesker, and Raymond Mesker, and many others, whose names are to the Grand Jury unknown, not to report when ordered so to do by the military authorities of the United States for military service, they, the said Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Vonder Brelje, Edward Weckworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Robt. Mesker and Raymond Mesker, and other persons whose names are unknown, being persons who had theretofore registered for service in the military forces of the United States, in accordance with that certain act of Congress of May 18, 1917, entitled 'An act authorizing the president to increase temporarily the military establishment of the United States,' and the rules and regulations of the president promulgated pursuant to said act of Congress of May 18, 1917; he, the said Abraham L. Sugarman, then and there, well knowing that the United States was at war, on the said 24th day of July, 1917, which is against the peace and dignity," etc.

To this indictment a demurrer (4) was interposed, which was overruled and to which an exception was taken. Thereupon a plea of not guilty was entered (4), the cause submitted to the jury and a verdict

of guilty (7) was returned. Thereupon a motion for a new trial was made, overruled and (7) an exception taken. A motion for an arrest of judgment (7) was then made, which was overruled, and to this an exception was taken and the defendant was (8) sentenced to three years in the penitentiary at Fort Leavenworth, Kansas, as aforesaid.

Bill of Exceptions.

The testimony on the part of the government, which has been preserved in its entirety in the bill of exceptions, is very short. Abraham Sugarman, the defendant, is 22 years of age (78), a single man, in very poor health. He is a resident of Minneapolis, registered under the draft law and is a member of the Socialist Party of St. Paul. On July 24th 1917, there was a public meeting in Kelso, Sibley county, Minnesota (11). The defendant arrived at this meeting about 10:30 or 11 o'clock in the evening and addressed it. The defendant had with him printed forms addressed to Congress, asking for a *referendum on* the conscription act and asked those present to sign (80). There were about 500 in the audience and among them young men of conscription age, including Martin Blesing, George Sander, and others mentioned in the indictment, who had registered under the selective draft law but who had not been called upon to submit themselves for a physical examination, and neither had they been mustered into the service of the United States.

In his address the defendant is charged with stating that he was against all wars and did not be-

lieve in war, and "that previous to this there were draft laws," and that "during the Civil war there was a community in Maine that resisted the draft and the authorities left them alone and they had lived peaceably in that community"; and "that George Washington was a large land owner," and that that was the cause of the "war at that time"; and that it was the same now as then, that the common people had to give their lives for the richer men; and that in St. Paul there were some who did not register—"a certain amount of people to be arrested and there would not be room enough for them."

The defendant said this is not a free country (56); that the Conscription Act would be declared unconstitutional. There is a sharp conflict in the testimony as to defendant's answers to questions from the crowd as to refusal to respond to a call for service, and the consequences of such refusal. According to the version of the Government witnesses the answers were that if (58) "you people all stick together * * * you will go right along running your farm and raising your pigs just as you are doing today."

Defendant's speech as an entirety was characterized by John F. McGovern, the chief witness for the Government, an attorney with the Department of Justice (52), in this language (59):

> "I think that all through the speech that the question of Socialism was the predominant factor in fact, but it was in its relation to the war, and to the fact that—he emphasized that this was a war of classes, and characterized the president as (on more than one occasion)—as

a pal and chum of Rockefeller and Morgan, and rich men generally, and said it was a rich man's war; and said, 'If Socialists had been in control of Congress there would be no war at this time.' It was Socialism in relation to the war that he spoke about particularly."

Specification of Errors.

We shall urge four errors committed by the trial court to the prejudice of the defendant, which are as follows:

1. In overruling the demurrer to the indictment for the reason that the indictment does not state an offense.

(a) The indictment states conclusions of the pleader and fails to state facts showing the commission of an offense.

(b) The indictment alleges that Martin Blesing and others who were present at the time the defendant delivered his address were registered under selective draft law, but were *not* called for physical examination or mustered into the service, and we contend they were not a part of the military or naval *forces* of the United States.

2. The trial court erroneously charged the jury that (96) "Whether the parties in whom it is alleged attempt was made to procure disloyalty and refusal of duty in the military forces of the United States, it appears by the uncontradicted evidence, and is admitted that the parties named in the indictment, these young men who are alleged to have been present at the time and place in question and

registered in accordance with the act of Congress of May 18, 1917. Also that they had been given their numbers at the drawing which took place in Washington on or about July 20, 1917. The court instructs you as a matter of law that under the evidence and the law these men that are mentioned in the indictment as having been present at this meeting were in the *military forces* of the United States within the meaning of that term as used in Section 3 of the act of June 15, 1917."

3. The trial court erred in charging the jury as follows: "It is for you to determine from the evidence whether the words claimed by the government had been used * * * *or some of them* or substantially these words * * * if you failed to find that the words charged by the government or *some of them* or substantially those words, were uttered by the defendant at the time and place in question * * * but if after a full and fair consideration of the evidence you are satisfied beyond a reasonable doubt that the defendant uttered the words *claimed* by the government, or substantially those words or *some of them.*"

4. The trial court erred in that it refused to hold that what the defendant is accused of saying was not a crime and cannot be made a crime under the Constitution of the United States, same being within the protection guaranteed by the First Amendment of the Constitution.

POINTS.

We shall argue in their order the following points:

I.

The indictment in this case is bad for the following reasons:

(a) It fails to state facts necessary to constitute an offense.

(b) The indictment is presented upon the erroneous theory that men who are registered under the selective draft act are a part of and within the military forces of the United States. The trial court erroneously charged the jury that persons registered were within and a part of the military forces of the United States. The presentation of our authorities will apply to the indictment and to the charge of the court.

II.

The court erred in charging the jury that proof of *some* of *the words* charged by the government to have been used by the defendants was sufficient with proof of intention, etc.

III.

That the oral statements charged to have been made by the defendant are within the protection of freedom of speech guaranteed by the First Amendment to the Constitution.

ARGUMENT.

I.

(a) The indictment fails to state facts necessary to constitute an offense.

The indictment charges that the defendant did feloniously and wilfully attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the *military and naval forces* of the United States to the injury of the *service* and of the United States, by then and there urging, counseling and advising a certain number of young men, namely, Martin Bleasing, Albert Sanders, George Sanders and others, not to report when ordered to do so by the military authorities of the United States for military service, they, Martin Bleasing, George Sanders and Albert Sanders, being persons who were theretofore registered for service in the military and naval forces of the United States.

This indictment does not purport to state any language used of any kind or character. At most there is merely the averment of a date of "counseling and advising, etc.," but this must be taken in the formal sense of compliance with the statute, since another date, also within the period coming under the statute, could be proved at the trial. The material elements are what was said or done, and in this vital respect the statement of the offense charged is dependent entirely upon conclusions of the pleader. The charge that the defendant urged,

counseled and advised certain specific individuals and others is not disclosed by any allegation of words, oral or written, or any act. To this the district attorney replies that "it is not necessary to set out evidence." Where an offense, however, is based upon language, oral or written, good pleading will not excuse setting it forth in language, at least in substance. Where words are the gist of the offense they must be set forth.

Updegraff, 11 S. & R. 394.
Commonwealth v. *Kneeland*, 20 Pick. 206.
Archibald's Crim. Plea, Pomeroy's Notes, Vol. I, p. 281.

This is so the court may see the natural and logical effect which the language might have had on the minds of the hearers. Where language, printed or in writing, is used, of an obscene or lascivious character it may be, upon being properly identified, eliminated from the pleadings, but then only upon the specific allegation that it is too obscene to be set forth. Where words are complained of, except where excused, they should be set out. It is necessary to set out the language used.

Konda v. *U. S.* (C. A. A.), 166 Fed. 91.
Commonwealth v. *Tarbox*, 1 Cush. 66-72.
King v. *Goldstein*, Moor's, pages 8, 15, 18.
3 Broad & B., 201.
Hughes Criminal Law and Procedure, Secs. 218-83-84.
Bradlaugh v. *Queen*, 3 Q. B. 607-634.

"Urging, counseling and advising" as used in the indictment are not conclusions from facts *stated* in

the indictment, but conclusions in the mind of the pleader, from possible language or acts, undisclosed to the defendant or the court by the pleader.

We refer to only a few authorities supporting our contention:

In Hurd's Criminal Pleading (Student's Series), pages 165-166, the author says:

> "In numerous cases it is said that it is a well settled rule of the common law, that, in setting out a statutory offense, it is generally sufficient to follow the words of the statute. But there is no such rule of law. No distinction is made by the common law as respects the degree of particularity and precision essential to the description of an offense between statutory and common law offenses. All indictments must specify the criminal nature and degree of the offense, and the particular facts and circumstances which render the defendant guilty of that offense. If the statute sets out fully and precisely the necessary ingredients of the offense, then an indictment is generally sufficient which follows the words of the statute. But such an indictment is good, (not) because it satisfies the common law rules of pleading. It is undoubtedly true, as a matter of fact, that where a statute creates an offense, it is generally sufficient to follow the words of the statute. But this is true, not because there is any rule of law to that effect, but because, when the legislature creates a new offense, the statute generally specifies the facts necessary to constitute the offense."

In *United States* v. *Carll*, 105 U. S. 611, the following paragraph appears:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves

fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all of the facts necessary to bring the case within that intent."

In *Evans* v. *United States*, 153 U. S. 584, the court said:

"A rule of criminal pleading which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *U. S.* v. *Mills*, 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said in this court in *U. S.* v. *Carll*, 105 U. S. 611, 'fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *U. S.* v. *Cook*, 17 Wall. 174; *U. S.* v. *Cruikshank*, 92 U. S. 542, 558.

"Even in the case of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *U. S.* v. *Simmons*, 96 U. S. 360; *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Pettibone* v. *U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *In re Greene*, 52 Fed. 104."

In *United States* v. *Greene et al.*, 115 Fed. 343-356, Judge Speer said:

> "It is an elementary principle of criminal pleading that, where the definition of the offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the specifics; it must descend to particulars." 1 Archb. Cr. Prac. & Pl., p. 291.

Judge Charles F. Amidon in the case of *United States* v. *B. H. Schutte*, Vol. 252, Fed. Reports, page 213, wherein the demurrer to the indictment was sustained, referring to Section 3 of the Espionage Law, said:

> "On its face this statute is confined to a limited class, namely, the military and naval forces and persons subject. To violate this statute the language must directly and proximately affect one or more of the limited class mentioned in the manner specified. To stretch this law so as to cover all disloyal utterances regardless of whether they affect the military or naval forces or the enlistment and recruiting service, would not only violate the cardinal rule that criminal statutes should be strictly construed but would divide the limitations which the statute itself expresses with unmistakable clearness. Such a perversion of the law would itself be a supreme act of disloyalty, though done for the avowed purpose of suppressing disloyalty. A valid indictment under the act must express three facts:
>
> "1. The thing must have been wilfully uttered. That excludes what is spoken in the heat of passion, without deliberate purpose. The term 'wilfully' as construed by the courts necessarily imports a deliberate purpose to accomplish one or more of the things forbidden by the law. (Quoting authorities.)

"2. The language itself must have been of a character to cause some of the results denounced by the law and *should be set forth in the indictment,* or, if too offensive for a judicial record it should be described so that the court can determine whether it possess the forbidden quality. * * * It is incumbent upon the party to specify in the indictment the circumstances under which it was uttered sufficiently to show that its utterance would possibly produce the forbidden result. This can not be left to speculation or inference but must be clearly and directly charged. The circumstances are an element of crime. And it is not enough to charge that the language was uttered with intent to violate the law, it would be a mere legal conclusion when proper pleading requires a statement of facts. The question is not for the pleader but for the court, and the facts must be set forth so the court can say whether or not they are a crime." *United States* v. *Hess,* 124 U. S. 483; *Knauder* v. *United States,* 237 Fed. 8, and other authorities cited.

"Congress has not left its purpose to be ascertained solely by a judicial interpretation of the Act of June 15, 1917. It has interpreted the act itself. By the statute recently passed and approved May 16, 1918, it expressly makes the mere utterance of disloyal language on certain subjects a crime. If such utterances were already forbidden by the Act of June 15, 1917, why the amendment?"

Continuing, Judge Amidon says:

"The Supreme Court of Minnesota (167 N. W. 547) has recently had this whole subject under examination in construing a statute of that state which is much more comprehensive than the federal law under which the present indictment is framed. The case referred to is *State* v. *Spartz,* decided May 17, 1918, but

not yet reported. There the indictment charged the defendant in the following language: 'The said Jake Spartz at Dundas in the County of Rice and State of Minnesota, did speak and use the following language to the witnesses hereinafter named and to the others: "Louis Seimers was wounded and should be dead long ago." That at said time the said Louis Seimers was a soldier in the army or navy of the United States government and was wounded while so engaged as such soldier in assisting the United States government in prosecuting the present war against Germany. That it was intended to express contempt by such language for the soldiers of the government of the United States and to thereby discourage others from giving their full and unqualified support to said government in carrying on and prosecuting the present war.'

"The sections of the state law (chapter 465), Laws of 1917, under which the indictment was framed, reads as follows:

"'Sec. 2. It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth, or otherwise, that men should not enlist in the military and naval forces of the United States or the State of Minnesota.

"'Sec. 3. It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States.'

"A demurrer was interposed to the indictment and overruled by the trial court. This ruling was brought before the Supreme Court and reversed. The court sets forth the reasons for its decision in the following instructive language:

"'It will be noticed that the gravamen of the offense under each section of the law is the teaching or advocating that men should not enlist, or that citizens should not aid. That would seem to show that the legislature did not attempt by this act to punish every idle casual remark, wicked though it may be, but only those utterances which on their face show a purpose to teach or advocate what the statute forbids, or which are made under such circumstances that it would be permissible for a jury to find a like purpose. The so-called innuendoes and recitals in this indictment do not tend to show that the words uttered might be interpreted by the jury as teaching or advocating that citizens should not aid the government in the prosecution of the war; nor are there any averments of accompanying circumstances showing that the spoken words were intended to teach, or could be understood by the hearers as advocating or teaching that citizens should not render such aid or assistance in the prosecution of the war as the government requires or has indicated as proper.'

"This decision is quite in harmony with the long established principles of the Circuit Court of Appeals of this circuit, and of the Supreme Court of the United States, as will be seen from the cases above cited.

"The uniform practice in framing indictments under the Act of June 15, 1917, has been to charge that the *seditious language* was either spoken personally to men belonging to one of the classes mentioned in the act, whose names are given, or that it was spoken to a public audience composed in part of such men. The attorney-general has printed in leaflets all charges to juries, and opinions of courts in causes arising under the act since its passage. So far as these disclose, the practice has been as I have just indicated. As the indictment in the present case fails wholly to state that the

language complained of was spoken to named persons belonging to one of the classes mentioned in the act, or to an audience at which such persons were present, it is fatally defective, and the demurrer must be sustained."

The indictment before this court names the young men who were registered but it does not state any language used or act committed by the defendant from which by an inspection of the indictment it can be seen to have the unlawful purpose which the act was passed to punish.

* * * * * *

(b) The indictment and the court's charge erroneously assumed that men registered under the Conscription Act are within "the military and naval forces."

Do the military and naval *forces* in Section 3 comprise only those actually drawn or mustered into the military service? Or all registered under the Selective Draft Act? Or all male persons between the ages of 18 and 45? It is our contention that the military and naval forces include only persons actually engaged in the military service of the United States, and therefore the court erred in overruling our motion (49) and in refusing our requested charge (49) based upon this definition of the military forces.

Forces, the Century Dictionary defines as "a union of individuals; a body of persons prepared for joint action; especially a military organization, or any distinct military organization; a force of police.

Insubordination, in connection with the phrase "to the injury of the service of the United States," as defined in *Griffin* v. *Thompson,* 95 N. E. 7-9, is "intentional wilful disobedience, by a person in service." *Insubordination* is defined by Webster's International Dictionary as "disobedience to authority."

Disloyalty is defined in *Wade* v. *Barr,* 155 Mo. App. 405, as "untrue to the cause of the employer." In the clause under consideration the meaning would be "untrue to the cause of the United States," declining to obey the rules and regulations imposed upon those in the military service.

Mutiny consists of a revolt against superior officers in the army or navy.

All of these words clearly imply the relations of actual service, thus bearing out the contention that the entire application of this clause of Section 3 is to persons actually within the service. The *service* is a department, or bureau, of the government, and the *forces* comprise the persons within the department, the soldiers and officers, military or civil, as distinguished from the *service,* or the military institution, as an institution. Disloyalty, insubordination, mutiny and refusal of duty could only be the act of persons within the service who make up its forces.

The necessity for using the noun "forces" to give meaning to this clause in no way justifies a sweeping definition which makes it include the *potential military forces* of the United States. If the language chosen had been *persons in the military*

and naval forces, perhaps the construction might have been somewhat more obvious.

The trial judge (49) called attention to the Constitution, Sec. 8, Art. I, in which the grant of power to Congress is "to raise and support armies; to provide a navy; to make rules for the governing and regulation of land and naval forces." Here there is a clear differentiation between the service, the army and the navy, and the forces, the persons within the service.

The trial judge also cited, in support of his rulings, Chap. 187, Vol. 30, Statutes at Large, p. 361, an act providing for an army for the Spanish-American war, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled; that all able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are hereby declared to constitute the *national forces,* and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

In this statute "national forces" refers to the body of men to be drawn from by enlistment. Here there is no ambiguity whatever, and we can not see that it argues against our contention, but on the contrary supports it.

A further citation by the trial judge was Section III of the National Defense Act, passed in June, 1916:

> "When Congress shall have authorized the use of the armed *land forces* of the United States for any purpose requiring the use of troops in excess of those of the regular army, the President may, under such regulations, including such physical examination as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war, unless sooner discharged, any and all members of the national guard and of the national guard reserve."

This section of the Draft Act supports our contention because *land forces* here refers to *enrolled men in the army.* It provides that when these troops are all in use and more are needed, the President may draft into the service additions to these forces.

Continuing, the trial judge called attention (50) to the Act of April 22, 1898 (30 Stat., p. 361), in which the *national forces* were declared to be male persons, citizens and certain others, between the ages of 18 and 45. Here again we note the distinction between "national forces" as used to designate those from whom enlistments might be drawn, and "military and naval forces" as used in the clause with which we are dealing.

We believe that a reasonable meaning justifies our conclusion that Congress intended by this latter phrase those who actually constitute the organized military and naval forces of the government, as distinguished from the use of "forces" in other statutes in specific designation of the body from which enlistments might be drawn.

II.

The trial court erred in instructing the jury as follows (62-65): "It is for you to determine from the evidence whether the words claimed by the Government to have been uttered by the defendant at this time and place, *or some of them,* or substantially these words. . . . If you fail to find that the words charged by the Government, or some of them, or substantially those words, were uttered by the defendant at the time and place in question * * * " We concede that it was not necessary for the Government to prove the exact words used by the defendant; also not necessarily all the words attributed to the defendant. Some of the words claimed to have been uttered by the defendant no doubt were uttered by him, and at the same time some of the words were harmless even from the viewpoint of the Government's charge.

But the jury was authorized by this portion of the court's charge to find the defendant guilty for using the most harmless words, as carrying with them all the words charged by the Government.

III.

The statements attributed to the defendant come within the protection of the First Amendment to the Constitution, guaranteeing the freedom of speech. The instruction of the trial judge on freedom of speech (101) limited the character of permissible public discussion of public policies to "a right to ***honestly*** discuss a measure or a law, and to ***honestly*** criticize it."

There are numerous cases pending in this court in which this issue is raised. Among them is the case of Eugene V. Debs, plaintiff in error, against the United States, which has been advanced for a hearing upon the same day set for hearing of this case. In the *Debs* case we will argue fully the question which is raised under this heading, and respectfully refer to the brief in that case in support of our contention here, in order to save repetition and the time of this court.

Respectfully submitted,

SEYMOUR STEDMAN,
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Attorneys for Plaintiff in Error.

SUGARMAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 345. Argued January 9, 1919.—Decided March 3, 1919.

To empower this court to review a judgment of a District Court as involving the Constitution, under Jud. Code, § 238, the writ of error must present a substantial constitutional question, properly raised below. P. 183.

A substantial constitutional question cannot be based upon a refusal to give requested instructions the substance of which was clearly embodied in the charge to the jury. P. 184.

A judge is not obliged to adopt the exact language of instructions requested, or to repeat instructions already given in substance. P. 185.

Writ of error to review 245 Fed. Rep. 604, dismissed.

THE case is stated in the opinion.

Hutchison v. *Brown*, 167 Pac. Rep. 624, 626; *Jackson* v. *Lair*, 48 Okla. 269. For earlier case, *contra*, see *Rice* v. *Anderson*, 39 Okla. 279. Compare also *Linam* v. *Beck*, 51 Okla. 727; *Henley* v. *Davis*, 57 Oklahoma, 45.

The petitioner in his brief sets out a number of letters from the Land Department on the question of whether, under § 3, the date of application is to be considered the date of birth, when date of birth not given. In all the communications where the question is considered it is stated in effect, as in that of August 24, 1908, from Mr. Leupp, Commissioner of Indian Affairs, to the Secretary of the Interior (Land 56330—1908 E. B. H.), that the "application for enrollment shall be construed, for the purposes of the Government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise." It is always stated that the act shall be so construed "*for the purposes of the Government.*" This does not purport to be a result reached on a careful interpretation of the act; but was apparently adopted simply as a practical working rule of the Department. *McDaniel* v. *Holland*, 230 Fed. Rep. 945, 948–950.

Mr. Seymour Stedman and *Mr. T. E. Lattimer*, for plaintiff in error, submitted.

Mr. John Lord O'Brian, Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Espionage Act (June 15, 1917, c. 30, Title I, § 3, 40 Stat. 217, 219) provides that: "Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States . . . shall be punished." Sugarman was charged with having violated this section on July 24, 1917, by words spoken in an address made at a Socialist meeting which was attended by many registrants under the Selective Service Act, sustained in *Selective Draft Law Cases*, 245 U. S. 366. He was tried in the District Court of the United States for the District of Minnesota, found guilty by the jury, and sentenced. See 245 Fed. Rep. 604. Thirty-one exceptions were taken to rulings of the trial judge. Instead of seeking review by the Circuit Court of Appeals under § 128 of the Judicial Code, the case is brought here under § 238.

Review by this court on direct writ of error is invoked on the ground that the construction or application of the Federal Constitution was drawn in question. Thirty of the rulings excepted to below are assigned as errors here. If any one of them involves a constitutional question which is substantial, or was such when the defendant sued out his writ of error, we have jurisdiction to review all the questions raised and it is our duty to determine

them, so far as necessary to afford redress, even if we should conclude that the constitutional question was correctly decided below. *Williamson* v. *United States*, 207 U. S. 425, 432, 434; *Goldman* v. *United States*, 245 U. S. 474, 476. But mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Hendricks* v. *United States*, 223 U. S. 178, 184; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123; *Brolan* v. *United States*, 236 U. S. 216, 218; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142.

Of the thirty-one exceptions taken below only two refer in any way to the Federal Constitution. These two are for refusal to give the following instructions:

(a) "The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. This right has been deemed so essential and necessary to free institutions and a free people that it has been incorporated in substance in the constitutions of all the states of the Union. These constitutional provisions referred to are not abrogated, they are not less in force now because of war, and they are as vital during war as during times of peace, and as binding upon you now as though we were at peace."

(b) "This provision of our Constitution will not justify or warrant advocating a violation of law. A man may freely speak and write and petition, but he is responsible for the consequences of what he may say, write or publish; and if what he says and publishes has a natural tendency to produce a violation of law, that is to impel the persons

addressed to violate the law, and the person using the language intends that it should produce a violation of law, then the person using such language is subject to punishment and this is not inconsistent with the right and protection guaranteed by the Constitution of the United States and of this state."

While the trial judge refused to give these specific instructions, his charge to the jury included the following passage:

"Now, considerable has also been said in this case about freedom of speech. The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. This provision of the Constitution is of course in force in times of war as well as in times of peace. But 'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it. A man has a right to honestly discuss a measure or a law, and to honestly criticize it. But no man may advise another to disobey the law, or to obstruct its execution, without making himself liable to be called to account therefor."

This passage in the charge clearly embodied the substance of the two requests made by the defendant. The judge was not obliged to adopt the exact language of the instructions requested, *Holt* v. *United States*, 218 U. S. 245, 253; nor was he obliged to repeat the instructions already given in substance. Compare *Bennett* v. *United States*, 227 U. S. 333, 339. As no substantial constitutional question was presented by the defendant, this court is without jurisdiction to review the other errors assigned.

Dismissed for want of jurisdiction.